Jany 20. 79. Rec'd. N. H. Swayne

Supreme Court of the United States.

OCTOBER TERM, 1878; JANUARY 20, 1879.

THE DENVER AND RIO GRANDE RAILWAY COMPANY, *Appellant*, *vs.* EBENEZER T. ALLING, *et als.*, *Appelles.*	No. 811.
THE CANON CITY AND SAN JUAN RAILWAY COMPANY, *Appellee*, *vs.* THE DENVER AND RIO GRANDE RAILWAY COMPANY, *Appellant.*	No. 812.

The Atchison, Topeka and Santa Fé Railroad Company, a corporation incorporated under the laws of the State of Kansas, and the Pueblo and Arkansas Valley Railroad Company, a corporation incorporated under the laws of Colorado, and with which the Canon City and San Juan Railway Company above named has been lawfully consolidated and united, now appear and move this honorable Court in and concerning the above-entitled causes now pending therein as follows, viz:

That they inform the Court and aver that the Pueblo and Arkansas Valley Railroad Company owns a railroad which, with its branches and extensions, is a continuation in Colorado of the line of the Atchison, Topeka and Santa Fé Railroad Company in the State of Kansas.

That since the pendency in this Court of the above-entitled

causes, contracts and arrangements have been made and executed between the said Denver and Rio Grande Railway Company, the said Atchison, Topeka and Santa Fé Railroad Company, and the said Pueblo and Arkansas Valley Railroad Company, with the consent and concurrence of the said Ebenezer T. Alling and others, appellees as aforesaid, which have been made since the filing of the stipulation for the argument of the above-entitled causes, and completed and in part executed since the filing of the printed arguments in said causes.

Whereby the said Atchison, Topeka and Santa Fé Railroad Company has taken a lease of all the constructed lines of railway of the said Denver and Rio Grande Railway Company for thirty years from the first day of December, 1878, and has received possession and is now in possession of and operating said lines, and has purchased and received all the railroad supplies and materials belonging to said Denver and Rio Grande Railway Company, and has purchased and has had transferred to a trustee for its use a majority of all the shares of the capital stock of the said Denver and Rio Grande Railway Company, with an agreement providing for a further purchase and ownership of the remainder of said capital stock, and an agreement that the Pueblo and Arkansas Valley Railroad Company and the said Atchison, Topeka and Santa Fé Railroad Company should have the selection of a majority of the directors of the said Denver and Rio Grande Railway Company, (the other third being selected by the bondholders of the said Denver and Rio Grande Railway Company,) the said contracts and arrangements having been made with the intent and design of ending all controversies, and especially all competitive construction of railroad lines between the Denver and Rio Grande Railway Company on the one part, and the Atchison, Topeka and Santa Fé Railroad Company, and

the roads operated and controlled by it, including the Pueblo and Arkansas Valley Railroad Company on the other part.

So that by reason of the premises the said Atchison, Topeka and Santa Fé Railroad Company, in its own right, and in connection with the said Pueblo and Arkansas Valley Railroad Company, has become and is equitably the owner, and entitled to the control of all the affairs, suits, interests and property of the said Denver and Rio Grande Railway Company; and especially to the discontinuance of all litigation hostile to the interests of the said Atchison, Topeka and Santa Fé Railroad Company, and the said Pueblo and Arkansas Valley Railroad Company.

All which they are ready to verify as this honorable Court shall order, and which will in part appear by the affidavits and copies of lease, and contracts filed herewith.

And T. Jefferson Coolidge, the trustee hereinbefore referred to, submits in aid of this motion his consent, and request, as set forth in his affidavit herewith filed.

Whereupon the said Pueblo and Arkansas Valley Railroad Company, (which is the present corporate name of the said Cañon and San Juan Railway Company), and the said Ebenezer T. Alling and others, appellees, move the court that the stipulation for the submission of the causes upon printed arguments may be canceled and discharged, and the printed arguments filed in the said causes be withdrawn from the files; and that the said appeals may be dismissed without costs to the appellees.

And the said Atchison, Topeka and Santa Fé Railroad Company moves to be allowed to intervene, and take charge and disposal of said causes in the name and on behalf of the said Denver and Rio Grande Railway Company, and to appear by its solicitor on behalf of the appel-

lants therein, that it may give the consent of the appellants to the dismissal of said appeals.

The Cañon City and San Juan Railway Company (now the Pueblo and Arkansas Valley Railroad Company), by

CHAS. E. GAST,
Its Solicitor.

Ebenezer T. Alling and others, appellees, by

CHAS. E. GAST,
Their Solicitor.

The Atchison, Topeka and Santa Fé Railroad Company, by

E. R. HOAR,
Solicitor.

E. R. HOAR,
Of Counsel.

Supreme Court of the United States,

Of the October Term, 1878.

THE DENVER AND RIO GRANDE RAILWAY COMPANY, APPELLANT,
vs.
EBENEZER T. ALLING ET AL., APPELLEES. } No. 811.

THE DENVER AND RIO GRANDE RAILWAY COMPANY, APPELLANT,
vs.
THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY, APPELLEE. } No. 812.

Additional Affidavits of Appellant in Opposing Motion in Answer to "Additional Motion Papers," Filed March 14, by the Appellee.

UNITED STATES OF AMERICA,
District of Columbia, City of Washington, } *ss:*

William A. Bell, being duly sworn, deposes and says he resides in the State of Colorado; that he has been the vice-president and one of the board of trustees of the said appellant, the Denver and Rio Grande Railway Company, nearly the entire period of the existence of the said company.

That he has been this day shown for the first time the "additional motion papers" in these cases, containing an

affidavit of Thomas Nickerson, purporting to have been sworn to March 6, 1879, in the Massachusetts district.

That at the time of the completion and pendency of the negotiations at Boston which resulted in the agreements of October 19, 1878, deponent was in Colorado and acting vice-president of the appellant, in charge of its affairs in the absence of its president, and in his stead.

That deponent was at the time in daily communication with the president, William J. Palmer, by telegraph.

That deponent did not at the time alleged in said Nickerson's affidavit receive the telegram, "See Strong at once, and arrange with him to give our contractors work and discharge them," or any telegram to that effect.

That deponent did receive telegraphic instructions on the said 19th day of October, 1878, in substance and in effect as follows, from said Palmer, to wit: "Stop Hutchins. Nickerson promises to give him other work. Keep Carlisle and Orman at work, and do nothing to injure our rights above the twentieth mile post."

That deponent received no other instructions on that subject, and that such instructions did not require the withdrawal of any contractors or workmen of the said company from their work on the contested right of way between Carson City and Leadville, but, on the contrary, required deponent to keep them at work, and not to waive any of the company's rights in the premises.

That said Hutchins' contract was not upon the contested right of way aforesaid; that this company was then and is yet enjoined from working on said contested right of way below the twentieth mile post, and Hutchins was at work on another line on the other side of the river from the one in controversy, and the appellant would lose all his work in the event of its succeeding in these cases and recovering its right of way.

That said Carlisle and Orman were contractors of said appellant above said twentieth mile post, and on the right

of way claimed by said company,—and in controversy in other suits then and now pending in the Circuit Court for the district of Colorado,—and deponent did in obedience to such instructions keep them at work thereon, and they ever since then have been and are working for the appellant on said right of way.

That deponent has heard Wm. J. Palmer testify in the suit aforesaid pending in the Colorado circuit, to the effect that he had no part or participation in the sending, nor did he assent to or approve, of the telegram marked Exhibit "B" in said additional motion papers. That the reason said Palmer does not now make his affidavit on the subject is, that he is in Colorado; and to-day is the first knowledge given me of said papers, and deponent has had no time to obtain such affidavit.

That deponent has read the copy of Exhibit M, attached to said "additional motion papers," purporting to be a copy of an appraisal of property. That, as deponent is advised and believes true, said Robinson, after the signing of said appraisal in blank, as stated by William B. Tuttle in his affidavit, without the knowledge, assent, or approval of said A. C. Hunt, his associate appraiser, or of J. C. Spencer, the umpire, filled in the blanks left with the amounts as now shown in said printed copy, and sent the same on as a completed appraisal, in violation of the rights of the Denver and Rio Grande Company, and both said Spencer and Hunt have since disavowed the said action of said Robinson, and the appraisal is not yet completed.

Deponent's attention has been called, also, to Exhibit A, connected with said "additional motion papers." That, as this deponent is advised and believes, the written agreements of October 19, 1878, in controversy on this motion, do not provide or require that either the Atchison, Topeka and Santa Fe Railroad Company or the Denver and Rio Grande Railway Company shall abandon its extension or its right of way from Cañon City to South Arkansas, but

that by such agreements the rights of both claimants are left for the final adjudication of this honorable court on the merits of these causes.

WILLIAM A. BELL.

Subscribed and sworn to before me this 17th day of March, A. D. 1879, at the said city of Washington.

CHARLES B. BEALL,
Notary Public.

[SEAL.]

SUPREME COURT OF THE UNITED STATES, OF THE OCTOBER TERM, 1878.

The Denver & Rio Grande Railway Company, Appellant, *vs.* Ebenezer T. Alling *et al.*, Respondents. } No. 811.

The Cañon City and San Juan Railway Company, Respondent, *vs.* The Denver & Rio Grande Railway Company, Appellant. } No. 812.

STATE OF COLORADO, *El Paso County*, } *ss:*

William B. Tuttle, being first duly sworn, does depose and say, that in December, 1878, he was bill clerk, at Denver, in the office of the Denver and Rio Grande Railway Company, and that under instructions received from Mr. W. W. Borst, superintendent, then having charge of the Denver and Rio Grande (constructed) Railway for the Atchison, Topeka and Santa Fe Railroad Company, deponent, on or about the fourteenth day of December, 1878, commenced to take an inventory of the supplies and materials at the shops of the said railway company at Denver. And that, since then, deponent acted as the assistant of A. C. Hunt, an appraiser appointed by the Denver and

Rio Grande Railway Company to fix and determine the price or value of all fuel, material, and other railroad supplies, to be transferred and delivered by the Denver and Rio Grande Railway Company to the Atchison, Topeka and Santa Fe Railroad Company. Deponent further says, that while he was taking the inventory at the Denver shops the said A. C. Hunt, together with A. A. Robinson, appraiser for the Atchison, Topeka and Santa Fe Railroad Company, went over the constructed line of the Denver and Rio Grande Railway, and took an account of material at points on the road other than Denver. That on their return to Denver, deponent met said Hunt and Robinson, and also the umpire, Jas. C. Spencer, at the Grand Central Hotel, Denver, where a room was provided for the use of the appraisers and their clerks. That before a complete and accurate transcript of the accounts and inventories could be prepared, a rough estimate was made and a certificate prepared, in words following:

DENVER, COLORADO, *December* 27, 1878.

W. J. PALMER, *Pres't D. & R. G. Ry. Co.*

DEAR SIR: As required by the terms of the lease of the Denver & Rio Grande Railway to the Atchison, Topeka and Santa Fe Railroad Company, herewith please find schedules and valuation of property belonging to the Denver & Rio Grande Railway Company at the date of delivery of the former to the latter company.

Schedule A, as per article 7 of the lease, embraces the material and supplies on hand, and prices for which the same is to be paid for by the lessor, amounting to

Schedule B embraces the list of rolling-stock and equipment, and valuation of the same, which is to be redelivered, as per article 11, to the lessor, at the expiration of, or other determination of the lease, amounting to

It being considered advisable to also make a list of all buildings, and condition of the same, and side tracks, in-

cluding present length, a supplemental report will be made, embracing these items.

The representative of the Atchison, Topeka and Santa Fe Railroad Company making claim that certain bridges on the Cañon City branch of the Denver and Rio Grande Railway are defective; that they have been frequently carried away, and are still liable to be injured by freshets, and seriously interfere with the working of the road, an inspection of the same was made, and evidence taken which supported the statement. The sum of $85,000 is allowed, to be expended for iron bridges, on stone abutments and piers, at each of the four crossings of the Arkansas River, and raising the grade of the road-bed where necessary to place the track above high water. It being understood and agreed, that should the cost of the work be below the amount allowed, the actual cost of the same when completed, verified by the chief engineer of the Atchison, Topeka and Santa Fe Railroad Company, shall be sent to each company, and taken as the proper sum for future settlement of the account.

No further claim being made as to the condition of the leased road, it otherwise must be considered as per article 11 of the lease, in thorough running order and condition.

(Signed) A. C. HUNT,
Appraiser for D. & R. G. R'y Co.

(Signed) A. A. ROBINSON,
Appraiser for A., T. & S. F. R.R. Co.

(Signed) J. C. SPENCER,
Umpire.

That the amount of the schedules, respectively, were left blank in such certificate, for the reason that the same could not then and there be accurately determined; that more property was expected would be found and added to both the schedules, and that for that reason, and also be-

cause the extended amount and figures could not be then determined, the said Hunt and Robinson, appraisers, and said Spencer as umpire, signed the said certificate in blank; that is, the definite sums-total of the schedules were not inserted.

That deponent saw them sign the said certificate in duplicate, and that this was done with the understanding that such amounts should be left blank and be filled in by the appraisers, so as to enable Mr. Spencer to return to Milwaukee, where he resided, before the actual completion.

That thereafter, and on or about the 27th of December, deponent left Denver for Pueblo, and that ever since deponent has been employed in making a copy of the inventory and schedules mentioned in the certificate; that deponent, together with others employed by said Robinson, made the necessary calculations, extended the amounts, and made the additions; that such calculations, amount, and additions have not been examined or approved by said Hunt, nor has said Hunt ever seen a clean copy of the schedules; and whether the same have been examined by said Robinson, deponent doth not know.

Deponent further says, that since the signing of the said certificates more property was found and added to the schedules respectively; that more property is yet to be added to schedule A, as deponent is informed and verily believes, amounting to more than a thousand dollars.

Deponent further says, that he has had, and now has, charge of and in his possession one original copy of the inventory and schedules, and certificate as far as completed, for said Hunt, and that as to the material added or to be added, and the total amounts, calculations, and additions, the appraisers have not yet either agreed or disagreed; that in fact they have not yet met for the purpose of completing and closing up the appraisement and filling in the amounts of the schedules in the certificate.

That deponent completed his copies of schedules in the

certificate referred to as far as the same could be completed during the last days of January, 1879.

WILLIAM B. TUTTLE.

Subscribed and sworn to before me this 19th day of February, A. D. 1879.

L. TAYLOR,
Notary Public.

[SEAL.]

March 17 79 Rec'd

Supreme Court of the United States.

Nos. 811 and 812.—October Term, 1878.

The Denver & Rio Grande Railway Co., Appellant,
No. 811. *vs.*
E. T. Alling et al.,
and
The Denver & Rio Grande Railway Co., Appellant,
No. 812. *vs.*
The Cañon City & San Juan Railway Co.

MOTION PAPERS.

Affidavit of Thomas Nickerson.

I, Thomas Nickerson, of Newton, in the Commonwealth of Massachusetts, of lawful age, on oath depose and say:

1. That I am the president of the Atchison, Topeka and Santa Fé Railroad Company, and treasurer of the Pueblo and Arkansas Valley Railroad Company.

2. That the Cañon City and San Juan Railway Company is lawfully consolidated with and now lawfully a part of the Pueblo and Arkansas Valley Railroad Company.

3. That the Atchison, Topeka and Santa Fé Railroad Company has and for more than two years has had possession and entire control of the Pueblo and Arkansas Valley Railroad Company, under a lease for thirty years, of which more than twenty-five years are yet unexpired.

4. That since the pendency in the Supreme Court of the United States of the appeals in equity from the Circuit

Court of the United States for the District of Colorado, upon the suits now pending in said supreme court, numbered respectively upon the docket of said supreme court 811 and 812, and since the filing of the printed arguments upon said appeals, (the said appeals being severally entitled The Denver and Rio Grande Railway Company, appellant, vs. Ebenezer T. Alling and others, appellees, and The Cañon City and San Juan Railway Company, appellee, vs. The Denver and Rio Grande Railway Company, appellant,) contracts and agreements have been made between the said Denver and Rio Grande Railway Company and the said The Pueblo and Arkansas Valley Railroad Company and the said Atchison, Topeka and Santa Fé Railroad Company, whereby and by virtue whereof, the said Denver and Rio Grande Railway Company has leased to the said Atchison, Topeka and Santa Fé Railroad Company, its railroad and property for thirty years from the first day of December, A. D. 1878, and on the thirteenth day of December, A. D. 1878, delivered possession of its railroad and property to the said Atchison, Topeka and Santa Fé Railroad Company, which has now full possession and control of the same, and contracted to deliver and has delivered to a trustee, for the benefit and to be under the control of the said Atchison, Topeka and Santa Fé Railroad Company, a majority of all the shares of the stock of the said Denver and Rio Grande Railway Company, with a further contract for the purchase by or on behalf of the said Atchison, Topeka and Santa Fé Railroad Company, of the remainder of the capital stock of the said Denver and Rio Grande Railway Company, with the design and intention to vest in the said Atchison, Topeka and Santa Fé Railroad Company, the entire control and disposition of all the affairs and interests of the said Denver and Rio Grande Railway Company, and with the further agreement that the said Atchison, Topeka and Santa Fé Railroad Company is henceforth to have the selection of two-thirds of the directors of the said Denver and Rio Grande Rail-

way Company, the other third being selected by the bondholders of said last-named company; that these contracts and agreements have been made with the concurrence and for the benefit of the said The Pueblo and Arkansas Valley Railroad Company, and of the said Alling and others its stockholders, whereby the said Atchison, Topeka and Santa Fé Railroad Company has become and is equitably the owner, and entitled to the control, management, direction, and disposal of all the affairs, suits, interests, and property of the said Denver and Rio Grande Railway Company, as by the several contracts, leases, declarations of trust, and other instruments hereinbefore referred to will more fully appear.

THOS. NICKERSON.

U. S. AMERICA, MASSACHUSETTS DISTRICT, *ss.*

January 16th, A. D. 1879.—Subscribed and sworn to by Thomas Nickerson within named, before me.

WM. S. DEXTER,
Commissioner of U. S. Circuit Court for said district.

Filed 20 January, 1879.

Affidavit of T. Jefferson Coolidge.

T. Jefferson Coolidge, of the city of Boston, State of Massachusetts, on oath deposes and says:

That under and in execution of the agreement between William J. Palmer, of Colorado, and Alden Speare, of said Boston, copy of which is hereto annexed, he has received and now holds the legal title to forty-two thousand five hundred and ten shares of the stock of the said Denver and Rio Grande Railway Company, being a majority of the shares of the said corporation. That among the trusts on which he holds the same is, that he is to vote upon said shares as he may be directed by the said Speare, and that he has been applied to and directed by said Speare to use the powers by him possessed under said agreement to

procure the discharge of the stipulation by which the above-entitled cases are to be submitted on briefs for adjudication by said court, if such stipulation has been made or filed; and further, to procure the dismissal of both said suits, so that all litigation on the subject-matter thereof may be termination.

Upon the foregoing facts he thus, therefore, hereby moves the court, if made, be discharged, and that the said suits be dismissed.

T. JEFFERSON COOLIDGE.

DISTRICT OF MASSACHUSETTS.

January 16, A. D. 1879.—Then personally appeared the said T. Jefferson Coolidge and made oath to the truth of the foregoing affidavit by him subscribed. Before me.

ELIAS MERWIN,
Commissioner of U. S. Circuit Court
for District of Massachusetts.

Filed 20 January, 1879.

This agreement, made and entered into this nineteenth day of October, 1878, witnesseth that William J. Palmer, of Colorado, party of the first part, and Alden Speare, of Boston, Massachusetts, party of the second part, in consideration of the mutual covenants and agreements hereinafter contained, have agreed and hereby do agree as follows:

On or before the first day of December, 1878, there shall be deposited with T. Jefferson Coolidge, esquire, also of Boston, as trustee hereunder, by the party of the first part or on his behalf, forty-two thousand five hundred and ten shares of one hundred dollars each in the non-assessable capital stock of the Denver and Rio Grande Railway Company, being a majority of said stock, and within ten days after the party of the first part shall have deposited in the post-office at the city of New York, properly enveloped and addressed to the party of the second part at Boston, Mass., with the postage prepaid thereon, a notice in writing,

there shall likewise be deposited with said trustee by the party of the second part or on his behalf, eight thousand five hundred and two shares of one hundred dollars each in the non-assessable capital stock of the Pueblo and Arkansas Valley Railroad Company, being at the rate of one share in the said stock of the last-named company for each five shares of the said stock of the Denver and Rio Grande Railway Company, so deposited by the said party of the first part. If either party fail, this agreement to be void, and the party not in default shall be entitled, upon demand, to the redelivery to him of the shares he shall have deposited as aforesaid in conformity hereto. But if neither party shall fail, then the said trustee shall have and hold said shares so deposited with him by the said parties respectively in trust, and dispose thereof as hereinafter provided.

The said trustee shall hand over and deliver to said party of the first part, for each five shares in the capital stock of the Denver and Rio Grande Railway Company so deposited, one share in the said stock of the Pueblo and Arkansas Valley Railroad Company, to have and to hold the same as his, the party of the first part's, property, free and discharged of and from all claims and demands of the said party of the second part, or any other person or persons, party or parties whomsoever, thereon or thereto, or on or to any part thereof; provided, however, that until the said party of the first part shall furnish proof satisfactory to said trustee, that all debts, including any liabilities of the said Denver and Rio Grande Railway Company for damages to persons or property carried, or injured, or for salaries, or non-fulfillment of contracts, up to the period of the delivery by the Denver and Rio Grande Railway Company of certain property described in a certain lease of the Denver and Rio Grande Railway Company, bearing even date herewith, to the Atchison, Topeka and Santa Fé Railroad Company, or incurred under the administration of the said Denver and Rio Grande Railway Company prior

to such delivery and which hereafter become debts, in excess of the sum of twenty-two thousand six hundred and sixty-four dollars per mile of its constructed road, shall have been either paid or payment thereof secured in a manner to be approved by said trustee, the said trustee shall retain from the said shares of the Pueblo and Arkansas Valley Railroad Company's stock, which would otherwise be deliverable to the party of the first part hereunder, not exceeding five thousand shares; but as and when the said debt shall be paid, or payment thereof secured in a manner to be approved by said trustee, the trustee shall hand over and deliver to the party of the first part as many of the said five thousand shares of the Pueblo and Arkansas Valley Railroad Company's stock so retained as may be reasonably proportionate to the amount of such debt so paid or secured, and upon being satisfied that all said debts of said Denver and Rio Grande Railway Company shall have been paid, or payment thereof secured in a manner satisfactory to him, said trustee shall hand over and deliver to the party of the first part the remainder of the said five thousand shares of the Pueblo and Arkansas Valley Railroad Company's stock retained as aforesaid.

I. Whenever, within one year from the date on which the Denver and Rio Grande Railway Company shall deliver possession under said lease to the Atchison, Topeka and Santa Fé Railroad Company, the said party of the first part shall offer to deposit with said trustee a further number or additional shares of the stock of the Denver and Rio Grande Railway Company, then the party of the second part shall and will, from time to time and as required, deposit with said trustee such additional or further amount of said shares in the capital stock of the said Pueblo and Arkansas Valley Railroad Company as he may deem proper, not, however, less than sufficient to deliver to the party of the first part one share in the said Pueblo and Arkansas Valley Railroad Company's stock for every five shares in the said Denver and Rio Grande Railway Company's stock

so offered by the party of the first part, which stock so to be deposited by the party of the second part shall by said trustee be delivered to the party of the first part whenever he shall deposit with said trustee any such further or additional shares in the capital stock of said Denver and Rio Grande Railway Company, at the rate of one share of the stock of the said Pueblo and Arkansas Valley Railroad Company for each five shares of the stock of said Denver and Rio Grande Railway Company, until all the stock of said last-named company, now amounting to eight million five hundred thousand dollars, par value, or eighty-five thousand shares, (inclusive of the shares to be deposited under paragraph 1,) shall have been deposited by the party of the first part: *Provided, however*, that if the party of the first part shall, at or before the expiration of said year, have deposited or offered to deposit with said trustee sixty-three thousand seven hundred and fifty shares of said stock of the Denver and Rio Grande Railway Company, the period of one year hereinbefore limited shall, at the option of the party of the first part, by notice in writing to be delivered to said trustee, be extended for a period not exceeding an additional year.

The said trustee shall have and hold the legal title to all the Denver and Rio Grande Railway Company's stock deposited with him by the party of the first part, and shall vote upon the said stock as directed by the party of the second part.

Whereas the Denver and Rio Grande Railway Company has made and executed a certain instrument in writing, bearing even date herewith, whereby it undertakes to grant, lease, and demise its constructed road to the Atchison, Topeka and Santa Fé Railroad Company, and whereas such lease and this agreement are parts of the plan whereby the constructed railroad of the Denver and Rio Grande Railway Company and its stock should be controlled in the interest of the Atchison, Topeka and Santa Fé Railroad Company and corporations whose roads are leased or other-

wise controlled by it, and the present stockholders of the said Denver and Rio Grande Railway Company, or their assigns, receive full-paid non-assessable stock of the Pueblo and Arkansas Valley Railroad Company in lieu of and on surrendering the shares of the Denver and Rio Grande Railway Company's stock held by him or them respectively, at the rate aforesaid, which rate is based on the assumption that the indebtedness of said companies respectively, exclusive of stock, does not exceed a certain sum per mile of constructed road, and the said Denver and Rio Grande Railway Company has guaranteed to pay or secure the payments of its debts in excess of ($22,664) twenty-two thousand six hundred and sixty-four dollars per mile, exclusive of the stock, in furtherance of the plan: Now, for the purpose of enabling said William J. Palmer to collect from each holder of the Denver and Rio Grande Railway Company's stock a proportionate share of said excess, the party of the second part further covenants and agrees that the entire interchange of stocks shall be made by the parties hereto, and through the intervention of said trustee and as herein provided and not otherwise, howsoever: *Provided*, that nothing herein contained shall be deemed to authorize the party of the first part, by pursuing the remedies herein provided or other remedies, to compel such interchange after the period of one year, or, if such period be extended as aforesaid, after the expiration of such extension. It is further agreed that whatever assets the said Denver and Rio Grande Railway Company may have outside said demised railroad and premises at the time of surrendering possession thereof to the Atchison, Topeka and Santa Fé Railroad Company, or accruing to it afterwards on account of the administration of its business before such date, shall be well and truly applied towards the payment of such debts of said company (in excess of the said sum of twenty-two thousand six hundred and sixty-four dollars per mile) as the party of the first part may direct and in such manner as he may direct, and that the trustee hereunder, or the

person to whom the trustee may hereafter transfer and assign the stock which shall be deposited with him by said party of the first part, shall at all times and whenever requested aid and assist with his or their vote on such stock or otherwise howsoever in carrying out this provision.

It is further agreed that inasmuch as part of the debt of the Denver and Rio Grande Railway Company, in excess of $22,664 per mile, has been incurred for work done and material expended for extending its lines, that such work done and material expended forms part of the assets aforesaid, and that whenever any such work or materials shall be used or taken possession of or otherwise accrue to the benefit of the Atchison, Topeka and Santa Fé Railroad Company, or the Pueblo and Arkansas Valley Railroad Company, or any corporation whose road is or shall be leased or controlled by it, the Atchison, Topeka and Santa Fé Railroad Company, the value of such work and material so used and taken possession of or otherwise accruing to the benefit of the Atchison, Topeka and Santa Fé Railroad, or other corporation as aforesaid, shall be appraised by two persons, one to be appointed by the president of the Atchison, Topeka and Santa Fé Railroad Company, and the other by the party of the first part, or, in case such persons shall disagree, by an umpire to be appointed by the said president and the party of the first part, and the decision of such umpire shall be final, and the party of the second part promises and agrees on demand to pay to the party of the first part the amount or amounts so agreed upon or fixed by said umpire, and that failing to pay the same on such demand, such amount or amounts shall be held to reduce the debt of the Denver and Rio Grande Railway Company in excess of $22,664 per mile pro tanto, and the trustee hereunder shall deliver to the party of the first part a proportionate number of the five thousand shares in the Pueblo and Arkansas Valley Railroad Company's stock which he shall have retained as aforesaid, but the party of the first part covenants that on receiving such amount or

amounts from the party of the second part he shall and will well and truly apply the same to the reduction of the said debt in excess of $22,664 per mile. It is further agreed, inasmuch as the debts of the Denver and Rio Grande Railway Company, in excess of $22,664 per mile, include any liabilities of the Denver and Rio Grande Railway Company for damages to person or property carried, or salaries or non-fulfillment of contracts, up to the period of the delivery of the leased property to the Atchison, Topeka and Santa Fé Railroad Company, or incurred under the administration of the company prior to such delivery and which hereafter shall become debts, that the party of the first part shall have the right, full power, and authority to defend in the name of the Denver and Rio Grande Railway Company, but at his own proper cost and expense, any suit, action, or other legal proceeding which shall or may be brought or be pending to enforce such liability, and that if the power and authority hereby granted shall be insufficient, the board of directors, or other duly authorized officer of said company for the time being, shall, on the written request of the party of the first part, grant and confer such power and authority on the party of the first part without delay or condition imposed. It is understood that this agreement is to bind the party of the second part as the legal holder of the Pueblo and Arkansas Valley Railroad Company's stock hereinbefore referred to as a representative of all persons or parties having or lawfully claiming to have a beneficial interest in such stock; that any liability however arising from the breach of any covenant, or the non-performance of any act on behalf of the party of the second part, may be enforced against him individually, and in case said party of the second part shall die, or become incapable by disease to perform his part of this agreement, its provisions shall be carried out by Isaac T. Burr; that in case the party of the second part shall die or become incapable to act, the rights and privileges to him herein granted and obligations to be

performed by him shall be exercised by William A. Bell, of Colorado. In case of any failure on the part of the party of the second part to deliver to said trustee the Pueblo and Arkansas Valley Railroad Company's stock or any part thereof, (over and above eight thousand five hundred shares,) when and as provided in this agreement, the said trustee shall if he then holds any Denver and Rio Grande Railway Company's stock, and otherwise the said party of the second part shall transfer and deliver to the party of the first part ten shares of Denver and Rio Grande Railway Company's stock as penalty for each share of Pueblo and Arkansas Valley stock he may fail to so deliver, and there shall be the same penalty for each share of Pueblo and Arkansas Valley Railroad Company's stock that may be exchanged for stock of the Denver and Rio Grande Railway Company's by the Pueblo and Arkansas Valley Railroad Company, or by the Atchison, Topeka and Santa Fé Railroad Company, or by any party or company directly or indirectly acting for them or either of them during the periods herein provided, except the same shall be made by the parties hereto through the trustee. The party of the second part covenants not to part with any of the Denver and Rio Grande Railway Company's stock delivered to him under this agreement until December 2d, 1879, or if the time be extended as provided herein until December 2d, 1880: *Provided*, that nothing herein contained shall be held to prevent the delivery to the party of the first part of any shares of said stock provided to be delivered to him as penalty.

And the said party of the second part covenants and guarantees that the debt of the Pueblo and Arkansas Valley Railroad Company does not exceed, exclusive of stock, eleven thousand seven hundred and eighty dollars per mile, and in case the total debt of that company shall exceed that sum the party of the second part promises and agrees that he shall and will deposit with said trustee so many shares of non-assessable stock of the last-named

company in addition to the shares hereinbefore agreed to be deposited by him, as shall enable the trustee to deliver to the party of the first part, on account of stock then already deposited by him, or which he may hereafter deposit, an additional amount of said Pueblo and Arkansas Valley Railroad Company's stock for each five shares the party of the first part shall then have deposited or thereafter deposit in the same proportion as the excess may bear to the amount of debt aforesaid, and if default be made in such deposit or delivery the party of the first part shall have the right to demand from said trustee and of the party of the second part the return of a proportionate number of shares of the Denver and Rio Grande Railway Company's stock, which, upon such demand, shall be delivered to him by the trustee or the party of the second part as the case may be.

It is further agreed that in case any disputes shall arise between the parties hereto, the said trustees shall act as umpire, but if a dispute or difference arises between the parties or either of them and the said trustee, the party who shall claim his rights to be affected by such dispute and the trustee shall each appoint a referee, and the referees so appointed shall select another person who shall act as umpire, and the decision of any umpire appointed hereunder shall be final, and the parties and said trustee shall be bound to conform their action respectively to such decision.

It is further understood that "debts of the Denver and Rio Grande Railway Company, in excess of twenty-two thousand six hundred and sixty-four dollars per mile," are exclusive of its stock.

(Signed) WM. J. PALMER.
(Signed) ALDEN SPEARE.

Signed, sealed, and delivered
in presence of—
THEODORE L. H. MEYER.

Agreement of Alden Speare.

I, Alden Speare, do hereby certify, acknowledge, and declare that eight thousand five hundred and two shares of the capital stock of the Pueblo and Arkansas Valley Railroad Company's standing in my name on the books of said company, are held by me in trust for the purposes of my agreement with William J. Palmer, dated October 19th, 1878, and for the use and benefit of the Atchison, Topeka and Santa Fé Railroad Company, and I hereby agree at any time and times on the written request of the executive committee of said Atchison, Topeka and Santa Fé Railroad Company, to transfer to such person or persons as they may name, so many of said shares as they shall so request.

And I further agree to pay to the treasurer or assistant treasurer of said Atchison, Topeka and Santa Fé Railroad Company as soon as received, all sums of money received by me as dividends on said stock so held by me, and also on the stock of the Denver and Rio Grande Railway Company that I may receive in exchange for the stock of the Pueblo and Arkansas Valley Railroad Company as provided in said agreement aforesaid, belonging to said Atchison, Topeka and Santa Fé Railroad Company, and to vote or give proxies to vote upon such shares of said The Pueblo and Arkansas Valley Railroad Company and Denver and Rio Grande Railway Company, standing in my name as aforesaid, as the executive committee of said Atchison, Topeka and Santa Fé Railroad Company shall in writing request.

And to the faithful performance of these agreements I bind myself, my heirs, and representatives.

Witness my hand and seal, this 26th day of November, A. D. 1878.

ALDEN SPEARE. [SEAL.]

Witness: S. W. REYNOLDS.

Filed 20th January, 1879.

Copy of Potts Agreement, No. 1.

Memorandum of agreement to be made between the Atchison, Topeka and Santa Fé Railroad Company, represented by its president, Thomas Nickerson; the Pueblo and Arkansas Valley Railroad Company, represented by its president, Joseph Nickerson; and the Denver and Rio Grande Railroad Company, represented by Joseph D. Potts and Sebastian B. Schlesinger.

First, the A., T. & S. F. R. R. Co. is to take a lease of the D. & R. G. R. R. Co., to terminate November second, A. D. nineteen hundred and eight, and is to operate the road of the D. & R. G. R. R. Co., paying as rental thirty-five per cent. of the gross earnings of the leased road and such further percentage thereof as may be agreed on by the presidents of the two roads, or, in default of their agreement, as shall be fixed by a referee to be agreed on by them, whose award shall be final.

And in estimating the gross earnings on passengers or freight carried over the D. & R. G. R. R. Co., and also over the whole or a part of either of the other roads named, each mile of transportation over the D. & R. G. R. R. shall be reckoned equal to one mile and one-quarter on either of the other roads named, except that transportation over the Leadville or Cañon City Branch shall be reckoned as equivalent, mile for mile.

Of the above-named rental, any surplus, after paying interest on the bonds and debt of the D. & R. G. R. R. Co., shall be devoted to the purchase and extinguishment of the bonds and debt of the D. & R. G. R. R. Co., at the best market prices, to be ascertained by advertising for bids, but at not exceeding ten per cent. above par.

In case of competing trade, an equitable division of the traffic shall be made.

The P. & A. V. R. R. Co. agrees to purchase within one year from the date hereof all the stock of the D. & R. G. R. R. Co. which shall be offered it from time to time, as offered, after the second day of November next, paying one

share of its own stock for every five shares of the stock of the D. & R. G. R. R. Co.; and the D. & R. G. R. R. Co. agrees that it will furnish or cause to be conveyed at the above rate at least ten shares more than one-half of its entire capital stock within sixty days from the date hereof.

The P. & A. V. R. R. Co. guarantees that its total debt does not exceed eleven thousand seven hundred and eighty dollars per mile of constructed road, and that its stock does not now exceed fifteen thousand four hundred and thirty-eight dollars per mile of constructed road, and the D. & R. G. R. R. Co. guarantees that its total debt does not exceed twenty-two thousand six hundred and sixty-four dollars per mile of constructed road, and that its stock does not exceed twenty-five thousand two hundred and twenty dollars per mile of constructed road.

The directors of the A., T. & S. F. R. R. Co. shall nominate two-thirds of the board of directors of the D. & R. G. R. R. Co.

The lease above mentioned to take effect on the second day of November next, or as soon thereafter as may be practicable, and the D. & R. G. R. R. Co. agrees to make a lease on the following terms, the lease is to be in the usual form,—details to be arranged hereafter.

Pending the completion of this contract, it is mutually agreed that friendly arrangements shall be made as far as practicable.

Dated the fourth day of October, A. D. 1878.

(Signed)

ATCHISON, TOPEKA & SANTA FÉ RAILROAD COMPANY,
By THOS. NICKERSON, *Prest.*

(Signed)

PUEBLO AND ARKANSAS VALLEY RAILROAD COMPANY,
By JOS. NICKERSON, *Prest P. & A. V. R. R.*

(Signed) DENVER & RIO GRANDE R. R.,
By SEBASTIAN B. SCHLESINGER,
JOS. D. POTTS, subject to the approval of the president of the D. & R. G. R. R.

Filed 20 January, 1879.

Certificate of Vote of Executive Committee of P. & A. V. R. R. Co.

At a meeting of the executive committee of the Pueblo and Arkansas Valley R. R. Company, held at their office, November 25, 1878, F. H. Peabody offered the following preamble and resolution, which was unanimously adopted:

Whereas the road of this company is leased to the Atchison, Topeka & Santa Fé Railroad Company, and our receipts depend entirely upon the amount of business done over our road, being a certain percentage of the gross earnings from the business done on our road and of a rebate for all business passing to or from our road over said Atchison, Topeka & Santa Fé railroad; and whereas the Denver and Rio Grande Railway Company controls a business of great value, which at this time is delivered almost exclusively to other companies, but which would, if delivered to our road, greatly increase the earnings and receipts of this company; and whereas said Atchison, Topeka & Santa Fé Railroad Company is willing to lease and obtain control of the business of said Denver and Rio Grande Railway Company, so that such business shall pass over our road and we shall obtain therefrom great benefit, but the obtaining of such control and business will require a large expenditure of money by said Atchison, Topeka & Santa Fé Railroad Company, a part of which we should in equity bear: therefore, it is—

Resolved, That if the Atchison, Topeka & Santa Fé Railroad Company shall secure a lease for thirty years from December 1st, 1878, of said Denver and Rio Grande Railway Company, so that its business shall, so far as practicable, pass over our road and we receive therefrom the above-mentioned benefits, we will issue and deliver to said Atchison, Topeka & Santa Fé Railroad Company, towards meeting said expenditure and for their services in securing said business for us, fully-paid capital stock of our company to the amount of seventeen thousand (17,000) shares, or so

much thereof as may be found necessary to carry out their plan of leasing and controlling the business aforesaid.

Voted to adjourn.

(Sg'd) THOMAS NICKERSON,
Ass't Sec'y.

Filed January 20, 1879.

Copies of Joint Orders.

DENVER & RIO GRANDE RAILWAY CO.,
PRESIDENT'S OFFICE,
COLORADO SPRINGS, COLORADO, *December 13th*, 1878.

Notice.

The Denver and Rio Grande Railway Company having leased its constructed line, from Denver to Pueblo and thence to El Moro and the El Moro collieries, and from Cucharas to Alamosa, and from Pueblo to Cañon City and the Cañon coal mines, to the Atchison, Topeka & Santa Fé Railroad Company, you are hereby notified that possession of the leased line and property will be given to the last-named company at the hour of 12 midnight of this the 13th day of December, 1878, and all persons engaged in the operation of said railroad, except in the general offices at Colorado Springs, will be in the employ of the Atchison, Topeka & Santa Fé Railroad Company from and after that time, and thenceforth are hereby required to report to Mr. William B. Strong, vice-president and general manager of the A. T. & S. F. R. R. Co., at Topeka, Kansas.

(Sd.) WM. J. PALMER, *President.*

OFFICE OF THE DENVER & RIO GRANDE RAILWAY CO.,
COLORADO SPRINGS, COLORADO, *Dec'r 13th*, 1878.

To connecting lines.

You will please take notice that the constructed railway of the Denver and Rio Grande Railway Company has been leased to the Atchison, Topeka & Santa Fé Railroad Com-

pany, to whom possession has this day been given, and that from and after this date the said railway, from Denver to Pueblo, El Moro, Alamosa, and Cañon City, will be operated by the lessee. We request settlement of all accounts for tickets and freight respecting business, up to and including December 13th, 1878, to be made as heretofore with R. F. Weittrec, treasurer of the Denver and Rio Grande Railway Company, Colorado Springs; and respecting all business, after said date, to be made with E. Wilder, treasurer of the Atchison, Topeka & Santa Fé Railroad Company, at Topeka, Kansas.

(Sd.) WM. J. PALMER,
President Denver and Rio Grande Railway Co.

(Sd.) W. B. STRONG,
Vice-President and General Manager
A. T. & S. F. R. R. Co.

Filed January 20, 1879.

Form of Lease Denver & Rio Grand R. R. Co. and Atchison, Topeka & Santa Fé R. R.

This indenture, made this — day of October, A. D. 1878, between the Denver & Rio Grande Railway Company, a corporation duly organized and existing, owning and operating a railroad line in Colorado, party of the first part, and the Atchison, Topeka & Santa Fé Railroad Company, a corporation duly organized and existing under the laws of Kansas, party of the second part, witnesseth:

That, in consideration of the sum of one dollar to it duly paid by the party of the second part at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and of the rents, covenants, and agreements hereinafter reserved and contained, on the part and behalf of the party of the second part to be paid, kept, and performed, the party of the first part to these presents has granted, leased, and demised, and by these presents

does grant, lease, and demise unto the party of the second part, its successors and assigns, all and singular the railroad which the party of the first part has heretofore constructed and operated in Colorado, commencing in the city of Denver and extending thence southwardly *via* Colorado Springs to Pueblo, on the Arkansas river; thence, still in a southerly direction, *via* Cucharas to El Moro, in Colorado, and to the El Moro collieries; and also from Cucharas westward *via* La Veta and Garland to Alamosa, on the Rio Grande del Norte; and also from Pueblo westward up the valley of the Arkansas river to Cañon City and the Cañon coal mines,—in all about three hundred and thirty-seven miles of railroad, more or less, exclusive of sidings; together with the lands and premises occupied by or connected therewith; together, also, with the rolling-stock, equipment, and appurtenances to the railroad hereinbefore described belonging or in anywise appertaining and owned or acquired by the party of the first part in connection therewith; also, all rights, privileges, and franchises of the said party of the first part necessary to the operation and management of said hereinbefore described railroad or the business thereof; including in the said premises hereby demised all the railroads, ways, and rights of way; all the depot grounds, tracks, bridges, viaducts, culverts, fences, and other structures, depots, station-houses, engine-houses, car and freight-houses, and other buildings, machine-shops and other shops, machinery and tools, and all other lands and property whatsoever belonging to the party of the first part, and which have heretofore been used or acquired for use in connection with the said hereby demised railroad or the business thereof;

Provided however, that nothing herein contained shall operate to grant or demise, or be construed to include the franchise to be a corporation heretofore conferred upon the said party of the first part or the corporators thereof, or any other right, privilege, or franchise which is or may be necessary or requisite to preserve the corporate existence

and organization of the party of the first part; and all such franchises to be a corporation, and all rights and privileges, other than those hereinbefore granted and demised, are hereby expressly reserved and exempted from these presents.

To have and to hold the said hereinbefore described railroad and premises with the appurtenances unto the party of the second part, its successors and assigns, from the first day of December, 1878, for and during, and until the full end of, the term of thirty years thence next ensuing, and fully to be complete and ended, the said party of the second part, its successors and assigns, yielding and paying therefor unto the party of the first part, its successors and assigns, during the said term hereby granted the rent hereinafter specified and in the manner hereinafter provided, and keeping and performing all and singular the covenants and agreements hereinafter set forth, to be by the said party of the second part kept and performed, subject, nevertheless, to debts contracted by the party of the first part, whether the same shall be secured by mortgage lien or otherwise howsoever or unsecured, not exceeding in the aggregate at the date of delivery of the demised premises the sum of twenty-two thousand six hundred and sixty-four dollars per mile of constructed road, including any liabilities of the party of the first part for damages to persons or property carried or injured, or for salaries, or non-fulfillment of contracts up to the period of the delivery of the leased property to the party of the second party, or incurred under the administration of the company prior to such delivery, and which hereafter shall become debts, but exclusive of stock, and any excess of such debts and liabilities, exclusive of stock, of the party of the first part over and above said sum, said party of the first part agrees and guarantees to pay or provide for. The party of the first part also covenants that the stock issued by it does not exceed eight million five hundred thousand dollars. And in consideration of the premises, the parties hereto have further covenanted,

promised, and agreed, and by these presents do covenant, promise, and agree, each for itself and its successors and assigns, to and with the other party hereto, its successors and assigns, as follows, to wit:

ARTICLE 1.—The party of the second part shall and will, at its own proper cost and expense and without deduction from the rent hereinafter provided to be paid to the party of the first part, manage, operate, use, and run the said demised railroad and property at all times during said term in the same manner as the party of the first part, as the owner thereof, or otherwise, is now or shall or may at any time hereafter during said term be required by law to do; and using, operating, and running the same, the said party of the second part shall and will, at its own proper cost and expense and without deduction from said rent, at all times during said term, maintain, preserve, and keep the said demised railroad and premises, fixtures, and appurtenances, and every part and parcel thereof in thorough repair, working order, and condition, and fully supplied with motive-power, rolling-stock, and equipment, and make all needful and proper additions thereto and improvements thereon, so that the traffic and business of the said demised railroad shall be preserved, encouraged, and developed, and that the same shall be at all times done with safety and expedition and the public be accommodated in respect thereto with all practicable conveniences and facilities, and that all future growth or increase of such traffic and business as the same may arise or be reasonably anticipated shall be fully provided for and secured. And the party of the second part promises, covenants, and agrees to meet the obligations of the party of the first part to the public by making from time to time and whenever needed or required such repairs, renewals and replacements, additions and improvements, in manner and for the purposes aforesaid, and to make all reasonable efforts and use all lawful means to maintain and preserve, develop and increase, all the business of said demised railroad.

ARTICLE 2.—The said party of the second part shall and will at all times during said term, at its own proper cost and expense and without deduction from the rent aforesaid, employ all such officers, superintendents, employees, and workmen, as shall be necessary to fully carry out the purposes of Article 1.

ARTICLE 3.—The party of the second part, for itself its successors and assigns, hereby covenants, promises, and agrees to and with the party of the first part, its successors and assigns, in consideration of the execution to it of this lease that the said party of the second part shall and will, well and truly apply and pay, or cause to be paid in manner hereinafter provided as and for rent of the herein demised property,

For the first year forty-three per centum,

For the second year forty-two per centum,

For the third year forty-one per centum,

For the fourth year forty per centum,

For the fifth year thirty-nine per centum,

For the sixth year thirty-eight per centum,

For the seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, and fourteenth years, thirty-seven per centum, and for the sixteen remaining years of the term thirty-six per centum of the total gross earnings of said demised railroad and the business thereof to be made up in the usual manner and as hereinafter provided; and it is further agreed that for the purpose of ascertaining and determining the amount of gross earnings upon and from which the rent aforesaid shall be computed and paid, the following principles shall govern: whenever any passenger or freight shall be carried over the said demised railroad, or any part thereof, and also over the railroads of the party of the second part or of the Pueblo & Arkansas Valley Railroad Company, built or to be built, or any part of either, said party of the first part shall be, for each mile of such transportation over the demised railroad, entitled to share in the distribution of fare and freight moneys, as if the same were carried one

mile and a quarter, except that transportation of business passing over that part of the hereby demised premises extending from Pueblo westward up the valley of the Arkansas river to Cañon City, or any part thereof, and likewise over the line from Cañon City to Leadville, shall only be reckoned mile for mile, it being the intention of this provision that the gross earnings from all business interchanged between said demised railroad, or any part thereof, and the railroads owned or controlled by the party of the second part or by the Pueblo & Arkansas Valley Railroad Company, built, or to be built, or any part of any of them, shall be divided on the basis of crediting each mile of transportation over the hereby demised railroad, as one and one-quarter miles; except where such business shall be interchanged between the demised line connecting Pueblo with Cañon City, and the road which may connect Cañon City with Leadville, in which case the gross earnings thereof shall be divided *pro rata* according to the number of miles hauled over the respective roads.

The said party of the second part hereby covenants and agrees:

a. That neither the Atchison, Topeka & Santa Fé Railroad Company, nor the Pueblo & Arkansas Valley Railroad Company, nor any other company which either of them may now or hereafter control, shall directly or indirectly build or operate or encourage any line or track not already constructed, that may be parallel to or competing with any constructed Denver and Rio Grande line, or impair the earnings or security thereof, nor lay a third rail or alter the gauge of any part thereof (except between Pueblo and the coal mines east of Cañon City) without at the same time widening the gauge or laying a third rail over all Denver and Rio Grande railway lines.

But the foregoing section shall not be construed to mean that any line between Cañon City and Leadville, or any extension beyond Leadville, is a competing line with any such constructed Denver and Rio Grande line.

ARTICLE 2.—The said party of the second part shall and will at all times during said term, at its own proper cost and expense and without deduction from the rent aforesaid, employ all such officers, superintendents, employees, and workmen, as shall be necessary to fully carry out the purposes of Article 1.

ARTICLE 3.—The party of the second part, for itself its successors and assigns, hereby covenants, promises, and agrees to and with the party of the first part, its successors and assigns, in consideration of the execution to it of this lease that the said party of the second part shall and will, well and truly apply and pay, or cause to be paid in manner hereinafter provided as and for rent of the herein demised property,

For the first year forty-three per centum,

For the second year forty-two per centum,

For the third year forty-one per centum,

For the fourth year forty per centum,

For the fifth year thirty-nine per centum,

For the sixth year thirty-eight per centum,

For the seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, and fourteenth years, thirty-seven per centum, and for the sixteen remaining years of the term thirty-six per centum of the total gross earnings of said demised railroad and the business thereof to be made up in the usual manner and as hereinafter provided; and it is further agreed that for the purpose of ascertaining and determining the amount of gross earnings upon and from which the rent aforesaid shall be computed and paid, the following principles shall govern: whenever any passenger or freight shall be carried over the said demised railroad, or any part thereof, and also over the railroads of the party of the second part or of the Pueblo & Arkansas Valley Railroad Company, built or to be built, or any part of either, said party of the first part shall be, for each mile of such transportation over the demised railroad, entitled to share in the distribution of fare and freight moneys, as if the same were carried one

mile and a quarter, except that transportation of business passing over that part of the hereby demised premises extending from Pueblo westward up the valley of the Arkansas river to Cañon City, or any part thereof, and likewise over the line from Cañon City to Leadville, shall only be reckoned mile for mile, it being the intention of this provision that the gross earnings from all business interchanged between said demised railroad, or any part thereof, and the railroads owned or controlled by the party of the second part or by the Pueblo & Arkansas Valley Railroad Company, built, or to be built, or any part of any of them, shall be divided on the basis of crediting each mile of transportation over the hereby demised railroad, as one and one-quarter miles; except where such business shall be interchanged between the demised line connecting Pueblo with Cañon City, and the road which may connect Cañon City with Leadville, in which case the gross earnings thereof shall be divided *pro rata* according to the number of miles hauled over the respective roads.

The said party of the second part hereby covenants and agrees:

a. That neither the Atchison, Topeka & Santa Fé Railroad Company, nor the Pueblo & Arkansas Valley Railroad Company, nor any other company which either of them may now or hereafter control, shall directly or indirectly build or operate or encourage any line or track not already constructed, that may be parallel to or competing with any constructed Denver and Rio Grande line, or impair the earnings or security thereof, nor lay a third rail or alter the gauge of any part thereof (except between Pueblo and the coal mines east of Cañon City) without at the same time widening the gauge or laying a third rail over all Denver and Rio Grande railway lines.

But the foregoing section shall not be construed to mean that any line between Cañon City and Leadville, or any extension beyond Leadville, is a competing line with any such constructed Denver and Rio Grande line.

And any line that may be built from any terminus of the Denver and Rio Grande lines, or in extension thereof, shall be of three feet gauge.

b. That the line of transportation *via* Pueblo to and from Denver and the Missouri river and all other points on any of the railroads owned, operated, or controlled by the party of the second part shall be kept open on equal terms with any other line or lines between Denver and such river or other points respectively for the carriage of freight and passengers, so as to enable the parties hereto to compete with any other line out of or into Denver, and that it will not make or enter into any agreement or understanding with any competing railroad for any division of business, territory, or earnings which shall in any way tend to injure or diminish the business or earnings of the railroad hereby demised without in some manner securing to the said railroad a proportionate benefit and advantage.

c. That where any traffic can be carried at the election of the lessees either over the railroad hereby demised or over some other of the railroads owned, controlled, or managed by the said party of the second part, then and in all such cases it shall be transported by the shortest line; and generally that in all cases of traffic wherein the said party of the second part but for this agreement and the covenants herein might be able or endeavor by fixing rates or in any other manner, to divert business from the said hereby demised railroad or any part thereof, the said party of the second part shall not so divert or endeavor to divert any such business to the injury of said demised road, but an equitable division of such business shall be made between them; and the local and other rates on the said demised road shall not be fixed or adjusted so as to impair or diminish the earnings thereof.

d. That the rates of freight on Cañon coal to all points on the lines owned or controlled by the party of the second part, east of the city of Pueblo, shall not be higher than on coal from Trinidad, or El Moro and vicinity, in southern Colorado, to the same point.

e. That the rates of transportation between the South Arkansas and Pueblo, or any point east or north of Pueblo, shall not be less than the rates on business between Alamosa and Pueblo, or said other points east or north of Pueblo.

The rent hereinbefore reserved shall be paid monthly, and it being provided herein that the term hereby granted shall begin on the first day of December, in the year eighteen hundred and seventy-eight, it is hereby further agreed and declared that the rental provided to be paid as aforesaid shall commence to run on that day, and the instalment for the first calendar month shall be payable on or before the last day of the calendar month next succeeding such first month, and thereafter such payments shall be made for each month on or before the last day of each succeeding month.

ARTICLE 4.—That said party of the second part shall and will at all times during said term keep insured to the same extent as its other leased similar property, the rolling-stock, tools and machinery, buildings, bridges, or other structures erected upon the premises hereby demised, and all other property usually insured by railroad companies, and shall and will from time to time, and as often as the same shall become due, also pay and discharge, without deduction from the rent aforesaid, any and all premiums for such insurance, and also any and all taxes, assessments, duties, imposts, and charges whatsoever which shall or may be levied, assessed, or imposed during the said term by any governmental or lawful authority whatsoever upon the said demised premises and railroad, or any part thereof, or upon any business or earnings or income of the same, or upon the party of the first part with respect to the said railroad and premises, or any part thereof, or any business or earnings or income thereof, or upon the party of the first part for or in respect to any money which shall be paid or which shall become payable to the party of the first part as or on account of the rent hereinbefore reserved, or any money which shall

be paid or become payable to the party of the first part in pursuance of these presents or with respect to any interest or right under these presents or upon such money, interests, or rights, or which shall or may be hereafter assessed or imposed upon the party of the first part upon the amount of its capital stock by or under any governmental authority which is or may be exercised over any territorial jurisdiction within which any part of the said railroad or premises is or may be situated; it being the true intent and meaning of these presents, that all governmental charges upon the aforesaid property or the income to be therefrom derived, which may be imposed by or under any governmental authority capable of enforcing such charges against or on the said property or the corporation owning or leasing the same, shall be paid and satisfied by the party of the second part, however the forms thereof may change during the term of these presents, but that the said party of the second part shall not become liable to pay any tax imposed upon stockholders personally in respect to stock held by them or dividends or income derived by them therefrom, which shall be collected from such stockholders personally, without the intervention or service of the party of the first part or any of its officers or agents. And the party of the second part shall and will also at all times during the said term allow and pay to the party of the first part, and without deduction from the rent aforesaid, and as a part of the necessary expense of carrying on the business of said demised railroad, the cost of meeting the coupons and dividends of the party of the first part whenever due, and of the transfer of its bonds and stocks and of issuing certificates therefor wherever such transfer and issue is made, and of preserving and maintaining its corporate organization. And it is further agreed that the party of the second part will pay the current expenses of the party of the first part in preserving its corporate existence, maintaining its general offices, and paying the salaries of its officers during the month of December, 1878, and until the adjustment and settlement

of accounts and transactions up to and growing out of the transfer provided by this lease, and not exceeding in all ten thousand dollars.

ARTICLE 5.—The said party of the second part shall and will at all time during said term and the continuance of this lease keep an office in the city of Pueblo, Colorado, which shall be open at all reasonable hours and times for the transaction of the business of the said demised railroad, and at such office, under the direction of an auditor to be appointed by the party of the first part, its successors or assigns, whose salary shall be paid by the party of the second part, its successors or assigns, as part of the operating expenses of said demised railroad, keep full, true, and just accounts of any and all moneys received, and business done upon said demised railroad, and the character thereof, and of all moneys paid, laid out and expended, and liabilities incurred in connection with the same, and also full statistical accounts similar to those now kept by the party of the first part. The accounts so to be kept as above provided shall clearly distinguish between all business done over, and all moneys received and disbursed or expended, or liabilities incurred in operating that part of the demised railroad extending from Pueblo westward to Cañon City, and over the remainder of said demised railroad, and such account, and any and all accounts which shall or may be kept by the party of the second part, its successors or assigns, in relation to the said demised railroad, or the business thereof, or any part thereof, and vouchers relating thereto, shall at all reasonable times be open to the inspection and examination of the party of the first part, its successors or assigns, its or their duly authorized agent; and the said party of the second part shall, at its own proper cost, furnish monthly statements of the earnings and expenses of the said demised railroad and premises to the party of the first part, and annually, to wit, on or before the first day of April in each year, during the continuance of this lease, furnish to the said party of the first part, its

successors or assigns, a detailed statement, duly authenticated, of the earnings, income, and receipts arising from said demised railroad and premises, during the year ending the thirty-first day of December last preceding the said first day of April; and also a detailed statement, similarly authenticated, of all expenditures made by the party of the second part, upon the said demised railroad and premises, for repairs, renewals, replacements, additions, improvements thereto and thereon, and equipment thereof, specifying the purposes of any and all such expenditures, which statements so to be furnished, shall separately state and contain the earnings and income, operating expenses and other expenditures made for or on account of the said portion between Pueblo and Cañon City, and the remainder of the said demised railroad. And the party of the second part shall also, at its own cost, furnish for the use of the party of the first part, from time to time, whenever necessary, any and all reports and statements which the said party of the first part is now or may be hereafter required to make or file under or by virtue of any law enacted by competent authority.

ARTICLE 6.—The party of the second part shall and will, at all times during the term aforesaid, bear, pay, and discharge, at its own proper cost and expense and without deduction from the rent hereinbefore reserved, any and all expenses, costs, damages, liabilities, claims, and demands whatsoever, which shall or may arise out of its possession, management or operation of the said demised railroad and premises, or any part thereof, or out of the business thereof, during the said term, and shall and will, at all times during the said term, hold, save, and keep harmless, and indemnify the said party of the first part, of, from, and against any and all expenses of operating during said term the railroad and premises hereby demised, and all damages, liabilities, actions, causes of action, suits, claims, and demands for injuries to persons or property, or for causing the death of any person or thing, through accident, neglect,

or default, during said term, or for breach of contract or wrong done or permitted by the said party of the second part, in the refusal to transport, or negligence in transporting, any person, property, or thing, or the loss, conversion, or non-delivery of any property which the said party of the second part shall have agreed or be bound to transport over the said demised railroad, or any part thereof, or which the said party of the first part, as the owner of the said railroad hereby demised, or any part thereof, is or shall be under any legal obligation, by contract, public duty, or otherwise, to transport thereon, and of, from, and against any and all costs, damages, liabilities, actions, causes of action, suits, claims, and demands whatsoever, which shall or may arise out of or in respect to the management, operation, or business of the said demised railroad and premises, or any part thereof, by the party of the second part, during the term aforesaid. And the said party of the second part shall and will defend all suits which may be brought against the party of the first part during the said term, in respect to any matter or thing arising out of the management or operation of the said demised railroad, or any part thereof, by the party of the second part, and indemnify and save harmless the party of the first part, of, from, and against any and all matters and things whatsoever, which might or could be a charge upon, or operate to reduce the rent hereinbefore reserved, arising out of the management of the demised premises by the party of the second part.

ARTICLE 7.—Possession of the said demised railroad and premises shall be given by the party of the first part to the party of the second part on the second day of December, in the year eighteen hundred and seventy eight, and upon the delivery of such possession, the party of the first part shall transfer and deliver to the party of the second part, for use upon said demised railroad and premises, all machinery, tools, implements and furniture, fuel, material and all railroad supplies belonging to the party of the first part, which shall have been procured for the use of said railroad

or any part thereof, and shall then remain on hand; *provided, however*, that said fuel, material and other railroad supplies shall at the time of such transfer and delivery be paid for by the party of the second part, in cash, at a price to be agreed upon by two persons, one to be appointed by the president of each party hereto, and in case of their disagreement, by an umpire previously agreed upon by said presidents, whose decision shall be final. Such appraisement shall be made as soon as possible after the execution of these presents, and be evidenced by the certificate of said appraisers, or the umpire, to be made and executed in duplicate, one to be delivered to each of the parties hereto. The appraisers or said umpire shall arrive as nearly as possible at the value of the property as it may be on the day of giving possession of the hereby demised property.

The sum agreed upon by the appraisers, or fixed by the umpire in accordance with the foregoing provisions, shall be deposited by the party of the second part with Sebastian B. Schlesinger as trustee, who shall hold the money deposited with him in trust, and shall at the time of the delivery of possession of the demised railroad hereunder to the party of the second part, and upon the surrender by the party of the first part of the certificate aforesaid, pay over to the party of the first part, or any person by it lawfully authorized to receive the same, the sum or price so agreed upon or fixed and certified; and the party of the first part covenants and agrees that such money shall be applied to the payment of any of its debts, exclusive of stock, in excess of twenty-two thousand six hundred and sixty-four dollars per mile, as aforesaid.

And it is further matually covenanted and agreed by and between the parties hereto that the party of the first part shall at its own cost receive and collect all earnings, incomes, issues, and profits of the said demised railroad and premises or any part thereof, and claims and demands arising from the business and operation thereof prior to the said first day of December, 1878; *provided, however*, that

if the party of the first part shall so request, such collection and any payments which the party of the first part shall request to be made out of the same, shall be made for the party of the first part by the agents of the party of the second part, so far as may be practicable in the ordinary course of their employment, without charge for the services of such agents.

ARTICLE 8.—And whereas the said party of the first part has heretofore made and entered into certain contracts and agreements in relation to the business of the said demised railroad, including contracts for supplies and material, and for the use and purchase of rolling-stock, and it is the intent and meaning of these presents that all contracts relating thereto not hereinafter excepted shall be assumed and carried out by the party of the second part, and that the benefit thereof should inure to, and the liability therefor rest on, the party of the second part, in place and stead of the party of the first part, now, therefore, the said party of the first part sells, assigns, transfers, and sets over unto the party of the second part all the right, title, and interest of the party of the first part in and under all such contracts and agreements which shall have been made in relation to the business to be done on the said demised railroad or any part thereof, or in respect to the furnishing of any supplies and material not hereinbefore specifically transferred, and the use and purchase of rolling-stock; and the party of the second part hereby assumes the performance of the same on the part and behalf of the said party of the first part, according to the true intent and meaning thereof; but nothing herein contained shall apply after December 31, 1878, to any traffic contract made by said party of the first part with any connecting railroad companies, unless with a road included in this lease, nor to any other contracts than such as have been made reasonably and in good faith in the course of the business of the said party of the first part; and the said party of the second part hereby promises, covenants, and agrees to

and with the said party of the first part, that the said party of the second part shall and will at all times hereafter save and keep harmless and indemnified the party of the first part, its successors or assigns, of, from, and against all costs, damages, expenses, liabilities, claims, and demands whatever, which shall or may arise under said contracts and agreements, or either thereof, by reason of any act or omission of the party of the second part; but the party of the second part is in no event to be liable for supplies or material except such as shall be actually delivered to it under such contracts, nor for rent of rolling-stock except such as accrues for use after taking possession, and in no case shall the party of the second part be obliged to assume any contract for the construction of any extension.

ARTICLE 9.—The said party of the first part hereby promises and agrees that as and when the several sums of money hereinbefore provided to be paid for rent under Article 3 shall be paid to and accepted by the party of the first part, the same shall immediately be deposited with the United States Trust or other trust company in New York city, in trust for the payment of interest on the debts of the party of the first part, going to make up the sum of twenty-two thousand six hundred and sixty-four dollars per mile, exclusive of stock, subject to which this lease is made; and if any surplus thereafter remains, such surplus shall be applied first to the payment of such debts and liabilities, other than its present mortgage bonds, as are mentioned in the habendum clause of this agreement, going to make up the sum of twenty-two thousand six hundred and sixty-four dollars per mile, exclusive of stock, subject to which this lease is made, but not including the excess of such debt and liabilities which the party of the first part has hereinbefore agreed to pay or provide for, until such debts and liabilities shall be fully paid and satisfied, and thereafter to the redemption and cancellation of its first mortgage bonds at the lowest market price, to be ascertained by advertising for bids, but at a price not exceeding ten per cent.

above par; and in case said bonds cannot be purchased at said last-named price, after reasonable advertising, such surplus shall be paid over to the party of the first part to be applied to payment of dividends to its stockholders. The party of the first part also agrees, on or before the first day of February next, to deposit in such trust company an amount which, with the interest allowed by said trust company to May 1, 1879, shall be equal to one-twelfth of the annual interest on its debt of twenty-two thousand six hundred and sixty-four dollars per mile, to be appropriated towards the payment of such interest.

ARTICLE 10.—In case the said party of the second part, its successors or assigns, shall at any time or times hereafter, during the term aforesaid, fail or omit to pay the rent hereinbefore mentioned or provided to be paid by the party of the second part, or any part of such rent, when the same shall have become payable as hereinbefore specified, or in case the party of the second part, its successor or assigns, shall fail or omit to fully keep and perform the covenants and agreements herein contained, or any of them, and shall continue in default in respect to the payment of such rent or the performance of such covenants and agreements, for the period of ninety days, then in either and every such case it shall be lawful for the party of the first part, its successors or assigns, at its or their own option, and without notice to the party of the second part, to enter into and upon the railroad and premises hereinbefore demised, and each and every part thereof, and remove all persons therefrom, and from thenceforth the said demised railroad and premises, with the equipment and appurtenances thereof, and all additions and improvements which shall have been made to the same, except so far as such additions and improvements shall belong to the party of the second part under Article 11, to have, hold, possess, and enjoy, as of the first or former estate of the said party of the first part in the said demised premises; and upon such entry for non-payment of rent or breach or non-performance of

any covenant or agreement herein contained to be by the said party of the second part observed or performed, all the estate, right, title, interest, property, possession, claim, and demand whatsoever of the party of the second part, its successors or assigns, in and to the said demised railroad and premises, or any part thereof, obtained in, under, or by virtue of this lease, shall wholly and absolutely cease, determine, and become void, anything hereinbefore contained to the contrary thereof in anywise notwithstanding. And in case of such re-entry as aforesaid, the rent hereinbefore provided and the several instalments thereof shall be apportioned from the time from which the last preceding payment of such instalment was made up to the time of such re-entry, and such portion thereof as would have been payable in respect to the intervening time, if the whole period in respect to which such instalment was payable had elapsed, shall be deemed and taken to be due and payable, and the said party of the second part shall pay the same. And it is further declared and agreed that such re-entry shall not waive or prejudice any claim or right of the party of the first part to or for damages against the party of the second part on account of such non-payment of rent, or the non-performance or breach of the terms of this lease; and all such claims and demands and rights thereto are hereby expressly preserved to the party of the first part.

ARTICLE 11.—And the said party of the second part hereby covenants, promises, and agrees to and with the said party of the first part, that upon the expiration and at the end of the said term, or other sooner determination of this lease, the said party of the second part shall and will redeliver and surrender to the party of the first part, its successors or assigns, the said demised railroad and premises in as good order and condition as the same shall be delivered to the party of the second part under this lease, with such additions, betterments, and improvements as shall have been made thereto, and also all rolling-stock, equipment, and other property delivered under this lease in as good

order and condition as its reasonable use and wear, proper repairs and replacements thereof being made from time to time, will permit; or rolling-stock, equipment, and other similar property, equivalent in character, amount, and condition thereto. And it is further mutually agreed that all the rolling-stock, equipment, machinery, tools, implements, and furniture, and other similar property, which the party of the first part shall at the time of delivering possession of the said demised railroad and premises, as hereinbefore provided, transfer and deliver to the party of the second part for use upon or in connection with said demised railroad and premises, shall be scheduled and valued, and all rolling-stock, equipment, machinery, tools, implements, furniture, and other similar property which the party of the second part, its successors or assigns, shall, upon the expiration and at the end of said term, or other sooner determination of this lease, redeliver and surrender to the party of the first part, its successors and assigns, shall likewise be scheduled and valued, by two persons, one to be selected by each of the respective parties, its, his, or their duly authorized officer or agent; and in case of disagreement of the persons so appointed, by an umpire previously to be selected by said parties or their duly authorized officer or agent, and that the decision of such umpire shall be final; and all rolling-stock, equipment, machinery, tools, implements, furniture, and other similar property used upon or in connection with said demised railroad and premises by the party of the second part, in excess of what shall be required by the terms hereof to keep good and replace similar property of the party of the first part, shall belong to the said party of the second part, and said appraisers or said umpire shall have power to make division and apportionment of all such property; and the party of the first part may at its option purchase whatever of such property shall be allotted to the party of the second party, at a price to be determined by said appraisers or said umpire. And in any such division any equipment acquired by payments of instalments shall

belong to the several parties in proportion to the amounts severally paid therefor by each party. It is further agreed, inasmuch as this lease is made upon the understanding that the railroad of the party of the first part shall be on the second day of December, 1878, in thorough running order and condition, that in case the party of the second part shall claim that it is not in such order and condition at that date, the question whether it is so or otherwise, and if otherwise what amount is required to be expended by said party of the second part to put it in such order and condition, shall be determined by appraisers or an umpire to be appointed as above provided; and the amount so determined shall be expended by said party of the second part, and shall be allowed to said party in the adjustment and settlement to be made at the end of the term or the earlier determination thereof.

ARTICLE 12.—The said party of the first part hereby covenants, promises, and agrees to and with the said party of the second part, its successors and assigns, that it, the said party of the first part, its successors and assigns, shall and will at any time or times hereafter and whenever thereunto requested by the party of the second part, its successors or assigns, execute, acknowledge, and deliver to the said party of the second part, its successors and assigns, at the proper cost and expense of the party of the second part, its successors and assigns, any and all such other and further instruments and assurances in the law for the better demising and leasing of the said railroad and premises to the said party of the second part, its successors and assigns, upon and subject to all and singular the rents, covenants, agreements, and conditions hereinbefore reserved and mentioned as by the party of the second part or its successors or assigns, or by its or their counsel learned in the law shall be reasonably advised, devised, or required, provided that at the time of such request, the said party of the second part, its successors or assigns, shall not be in default in respect to the payment of any rent or other moneys hereinbefore

agreed to be paid by it, or in default in respect to any of the covenants and agreements hereinbefore contained, to be kept and performed on its behalf; and said party of the second part covenants, promises, and agrees to and with the party of the first part, its successors and assigns, that the said party of the second part, its successors and assigns, shall and will at any time or times hereafter and whenever thereto requested by the party of the first part, its successors or assigns, execute, acknowledge, and deliver any and all instruments for the more effectually assuring the payment of the rent hereinbefore reserved or agreed to be paid, and the application of such rent money to and for the purposes herein set forth, and the performance of the promises and agreements hereinbefore set forth on behalf of the party of the second part to be kept and performed, as by the said party of the first part, its successors or assigns, or by its or their counsel learned in the law should be reasonably advised, devised, and required.

ARTICLE 13.—None of the provisions of this lease shall be abrogated or modified unless with the formal written consent of the trustees of the present mortgages of the party of the first part, or of the holders duly evidenced as such, owning or legally representing not less than two millions dollars of the bonds issued thereunder.

In testimony whereof, the said corporations, parties hereto, have caused these presents to be signed by their respective presidents thereto duly authorized, and their corporate seals to be hereto affixed the day and year first above written.

Filed 20 January, 1879.

Supreme Court of the United States.

Nos. 811 and 812. — October Term, 1878.

The Denver & Rio Grande Railway Co., Appellant,
No. 811. *vs.*
E. T. Alling et al.,
and
The Denver & Rio Grande Railway Co., Appellant,
No. 812. *vs.*
The Cañon City & San Juan Railway Co.

ADDITIONAL MOTION PAPERS.

Affidavit of Thomas Nickerson.

I, Thomas Nickerson, of Newton, in the Commonwealth of Massachusetts, on oath depose and say: —

1. That it was distinctly understood and agreed at the time negotiations were entered into between the Atchison, Topeka, and Santa Fé Railroad Company and the Denver and Rio Grande Railway Company, in October, 1878, that the latter company should discontinue building on the line of road between Cañon City and Leadville, through the Grand Cañon of the Arkansas; and that said line should, without hindrance, be built and owned by the Pueblo and Arkansas Valley Railroad Company in the control of said Atchison, Topeka, and Santa Fé Railroad Company.

2. That prior to such negotiations it had been voted by said Atchison, Topeka, and Santa Fé Railroad Company to consider no negotiation upon any other basis, a

copy of which vote is annexed, marked A; and such action and position were made known to the representatives of the Denver and Rio Grande Railway Company at the time of making such negotiations.

3. That William J. Palmer, President of the Denver and Rio Grande Railway Company, drafted, and I signed and sent, the telegram, a copy of which, marked B, is annexed, to notify the General Manager of the Atchison, Topeka, and Santa Fé Railroad Company of the result of said deliberations; and that said Palmer at the same time drafted, signed, and agreed to send to William A. Bell, representing the Denver and Rio Grande Railway Company in Colorado, a telegram in substance as follows: "See Strong at once and arrange with him to give our contractors work and discharge them."

That said Palmer at the same time drafted, S. B. Schlesinger wrote out in form approved by said Palmer, a letter which I signed and delivered to said Palmer, to the same effect, a copy of which letter, marked C, is annexed.

4. That said Palmer, under date of November 11, 1878, distributed a circular, a copy of which, marked D, is annexed, among the stockholders of the Denver and Rio Grande Railway Company, showing the same understanding; and the United States mail contracts with the Denver and Rio Grande Railway Company were transferred to the Atchison, Topeka, and Santa Fé Railroad Company, as is shown in copies of letters marked respectively E, F, and G, hereto annexed.

5. That I received from said Palmer a telegram, a copy of which, marked H, is annexed, approving the agreement heretofore exhibited, and called "Potts Agreement No. 1."

6. That duplicate copies of the lease heretofore exhibited between the Denver and Rio Grande Railway Company lessors and the Atchison, Topeka, and Santa Fé Railroad Company lessees were executed by said com-

panies, one by each, and deposited in escrow with S. B. Schlesinger, of said Boston, under an agreement, a copy of which, marked J, is annexed; all the conditions of which escrow agreement have been complied with on the part of said lessee company.

a. Said lease was ratified by the directors of said lessee company by vote, a copy of which, marked K, is annexed, and by said lessor company, as appears by said Palmer's telegram, a copy of which, marked L, is annexed.

b. That the deposit referred to in the second condition of said escrow agreement was to be of the sum to be fixed by appraisers and an umpire, under Article Seventh of said lease, "as soon as possible after the execution" thereof, and "to be evidenced by the certificate of said appraisers or the umpire."

A. A. Robinson, in behalf of the lessee company, and A. C. Hunt, in behalf of the lessor company, were duly appointed appraisers, with J. C. Spencer as umpire. Pending the appraisal, $150,000, estimated and agreed by both parties to said escrow agreement to exceed the value of the property to be appraised, was deposited by said lessee company with said Schlesinger, trustee, of which sum $75,000 was paid over to, and accepted by, said Palmer, in behalf of said lessor company.

That said appraisers and umpire duly made such appraisal, amounting to $142,163.23, as appears by their certificate, duly delivered, a copy of which, marked M, is annexed.

c. That said Palmer and Alden Speare did, on or before the first day of December, 1878, respectively deposit with T. Jefferson Coolidge, as trustee, the shares of capital stock required in the third condition of said escrow agreement.

7. That said Palmer has prevented the delivery of said papers deposited in escrow aforesaid, claiming that said appraisal has not been properly made; that said

Robinson has always been ready and anxious to complete said appraisal, if any errors or omissions could be shown; and that said Atchison, Topeka, and Santa Fé Railroad Company have always urged persistently the completion of said appraisal if incomplete, and have done nothing and omitted nothing to prevent such completion; but that said Hunt has absented himself, as this deponent believes, with intention that said appraisal should not be completed if incomplete as alleged, and that said papers deposited in escrow should not be delivered to said Atchison, Topeka, and Santa Fé Railroad Company.

8. That the rental reserved in said lease has, as it has become due, been paid by the lessee company.

THOS. NICKERSON.

U.S. AMERICA, MASSACHUSETTS DISTRICT, ss.

March 6, A.D., 1879, subscribed and sworn to by Thomas Nickerson, within named, before me.

ELIAS MERWIN,
Commissioner of U.S. Circuit Court for said District.

A

Copy of vote passed by the Executive Committee of the Atchison, Topeka, and Santa Fé Railroad Company, Sept. 30, 1878.

On motion C. J. Paine, and seconded, it was unanimously voted: That no proposition from the D. & R. G. Railway Co. should be considered which contemplates abandoning the extension from Pueblo to South Arkansas or Leadville, or the control thereof.

Voted to adjourn.

(S'd) GEO. L. GOODWIN,
Ass't Sec'y.

B

Copy of Telegram.

THOS. NICKERSON TO W. B. STRONG.

BOSTON, Oct. 19, 1878.

W. B. STRONG, TOPEKA, Kan.:

Agreement closed. Withdraw surveys to Denver. Stop construction Pueblo to Cañon City. Palmer agrees to stop construction Cañon to Leadville, but fears effect on contractors if he telegraphs peremptory stoppage until other work is promised. Have promised to consider his contractors same as our own, and give new contracts as quickly and as far as possible. Please communicate with their engineer, McMurtrie, and whatever work can be promised their contractors arrange through McMurtrie, to avoid claims for damages against Rio Grande as far as possible.

THOS. NICKERSON.

No. 721 D. H. Pass.

C

Copy of Letter.

THOS. NICKERSON TO W. J. PALMER.

BOSTON, Oct. 19, 1878.

W. J. PALMER, Esq.:

Dear Sir,—I enclose with this, copy of a letter to Mr. Strong. We shall be glad to give Carlile, Orman & Crook and Samuel Hutchins, now engaged in grading for your company between Cañon City and South Arkansas, contract equal, or nearly equal, in amount to what they are now engaged upon, as soon as we are (in the near future) prepared to go ahead; provided, of course, that their terms are as satisfactory to us as the terms offered by equally responsible people. I understand from you that Mr. Hutchins has several steam drills at work, and others on the way, for the purpose of being put to work on the Grand Cañon. If it is possible to arrange to give him

work in a part of the Grand Cañon, we should be glad to do so if the work could be expedited, which I think is probably the case.

If possible, we shall also endeavor to arrange to give Carlile, Orman & Crook a part of the work west of McCandless Bridge. We shall also pay you promptly for any work you may have done, and for any tools or machinery that you may have on hand for construction purposes, provided the same can be used by us. However, it is extremely difficult to say anything more definite at this distance from the scene of active operations, and I can only assure you, in general terms, that I shall take great pleasure in aiding you to cancel your construction engagements with the smallest possible expense and embarrassment to you, considering our relations towards these contracts and contractors, as nearly as practicable, what they would have been, had it been our work which they have contracted to do.

Yours respectfully,

(S'd) THOS. NICKERSON.

D

Room 63, No. 17 Courtlandt Street,
New York, Nov. 11, 1878.

To the Stockholders of the Denver and Rio Grande Railway Company: —

The recent negotiations with the Atchison, Topeka, and Santa Fé Company had for their object the consolidation of the Company which has built and is building the various extensions of that line, called the Pueblo and Arkansas Valley Railroad Company, with the Denver and Rio Grande Company.

The following quotation from a letter of the President

of the Atchison Company will explain why that plan was not carried out: —

OFFICE OF THE
ATCHISON, TOPEKA, AND SANTA FE RAILROAD CO.,
150 DEVONSHIRE STREET,
BOSTON, Oct. 19, 1878.

WM. J. PALMER, *President Denver and Rio Grande Railway Co.*: —

Dear Sir,—

* * * * * * * * *

I take pleasure in stating formally what I have repeatedly assured you of verbally during the negotiations of the last fortnight, viz.: that consolidation of the Denver and Rio Grande Railway Company with the Pueblo and Arkansas Valley Railroad Company was promised and in good faith attempted to be brought about by us, and would have been accomplished but for the doubts of counsel in regard to its legality.

The plan of lease to the Atchison, Topeka, and Santa Fé Railroad Company was finally adoped, with the idea and purpose of bringing about a union and welding together of all interests in the two properties, as near to consolidation as could legally be done.

* * * * * * * * *

Yours respectfully,

(Signed) THOS. NICKERSON.

As the closest practicable union, therefore, short of consolidation, the plan of lease to the Atchison Company was adopted, coupled with a separate personal agreement made with Wm. J. Palmer for the interchange of stocks of the Denver and Rio Grande and the Pueblo and Arkansas Valley Companies, on the general principle of equalizing the sum of the stock and debt per mile of the latter company with the sum of the stock and debt per mile of the former.

The Pueblo Company, whose stock is now between sixty-five and seventy in the market will be vastly benefited by the traffic of the Rio Grande Company, which has not heretofore passed over its line between Pueblo and the western border of Kansas, or over the Atchison Company's line between said border and Kansas City. This new trade, which will be carried mostly at local or non-competitive rates, is of itself considered in value equal to a dividend upon the stocks of both of said companies. As all trade to and from the Pueblo Company's lines, including that derived from the Leadville and New Mexican extensions, as well as from the Rio Grande Railway, will earn the rebate of 15 per cent. of the gross earnings of the Atchison Company from its carriage over that railroad (470 miles), the prospect of a quick reduction of the bonded debt of the Pueblo Company from the already small amount of $11,780 per mile to half that sum, or of its cancellation, without preventing current dividends (which can be paid from the rental), seems exceedingly good.

A further consideration, which adds to the value of the Pueblo Company's stock, is the right which all holders thereof, at the time being, will have of subscribing pro rata to further extensions.

Stockholders desiring to come in under this arrangement must deposit their certificates of stock endorsed to Wm. J. Palmer, trustee, at the office of the Denver and Rio Grande Railway Company, 17 Courtlandt Street, N.Y., or in Europe, at the office of A. G. Renshaw, 2 Suffolk Lane, Cannon Street, London, E.C., in exchange for which transferable certificates of interest in the "*Denver and Rio Grande Stock Trust*" will be issued by Wm. J. Palmer, trustee, entitling the holder to his full proportion of all results, on equal terms with the undersigned, and with all others who may join within the stipulated time.

Certificates of trust issued in Europe will not be good until countersigned by A. G. Renshaw.

Respectfully,

WM. J. PALMER.

E

Copy of Letter.

R. F. WEITBREC TO E. WILDER.

DENVER AND RIO GRANDE RAILWAY COMPANY,
TREASURER'S OFFICE,
COLORADO SPRINGS, Dec. 24, 1878.

R. F. WEITBREC, *Treasurer.*

E. WILDER, *Treasurer A. T. & S. F. R.R. Co., Topeka, Kan.:*

Dear Sir, — I enclose copy of a letter from 2d Ass't P. M. Gen'l Brady, and copy of my reply. I presume this will be entirely satisfactory to your company.

If so, please write Gen. Brady to that effect. Such a letter will doubtless expedite the adjustment, which is slow enough at the best. When the collections are made, we can remit to you your proportion.

Resp'y,

R. F. WEITBREC, *Treas'r.*

F

Copy of Letter.

THOS. J. BRADY TO R. F. WEITBREC.

POST OFFICE DEPARTMENT,
OFFICE OF THE SECOND ASSISTANT POSTMASTER-GENERAL.

Colo
D

WASHINGTON, D.C., Nov. 27, 1878.

Sir, — Your favor of the 21st instant has been received, and has been referred to the auditor.

In order that there may be no trouble in transferring the mail pay of your company, it will be necessary that the officers forward a formal relinquishment in favor of

the Atchison, Topeka, & Santa Fé Railroad Company, and a statement showing the date when that company commenced to operate your road.

Respectfully,

THOS. J. BRADY,
Second Ass't P.M. Gen'l.

R. F. WEITBREC, ESQ.,
Treas'r Denver & Rio Grande Rwy Co., Colorado Springs, Colo.

G

Copy of Letter.

R. F. WEITBREC TO THOS. J. BRADY.

Dec. 24, 8.

THOS. J. BRADY, *2d Ass't Post-Mr Gen'l, Washington, D.C.:*

Dear Sir,—Referring to your letter of Nov. 27, I have now to inform you that the lease of this company's constructed road took effect at midnight, Dec. 13. As the old management operated the road during most of the fourth quarter, it will doubtless be more satisfactory to all concerned that the settlement should be made through it for the entire period. Therefore, if you will kindly send the usual orders to me I will collect from the post-m's as heretofore, and you can remit the balance on receipt of the report. I have written to E. Wilder, Treasr of the A. T. & S. F. Co., enclos'g copy of your letter & this, & have no doubt the arrangement will be satisfactory.

Resp'y,

R. F. WEITBREC, *Treas'r.*

H

Copy of Telegram

OF W. J. PALMER, RATIFYING POTTS' AGREEMENT NO. 1.

PENNA. DEPOT, WEST PHILADELPHIA, PA., Oct. 5.

THOS. NICKERSON, *Pres't A. T. & S. F. R.R. Co., Boston:*

I ratify agreement.

(Signed) W. J. PALMER.

J

ESCROW AGREEMENT.

This memorandum of agreement, made the nineteenth day of October, 1878, Witnesseth:—

Whereas the Denver and Rio Grande Railway Company has made and executed a certain instrument in writing, bearing even date herewith, whereby it undertakes to grant, lease, and demise to the Atchison, Topeka, and Santa Fé Railroad Company all that certain railroad (337 miles, more or less, exclusive of sidings), and other property therein more particularly described, in consideration of a certain rent therein reserved, and certain covenants, promises, and agreements therein contained, by the said Atchison, Topeka, and Santa Fé Railroad Company to be paid, kept, and performed, as thereby, reference being thereunto had, will more fully appear, and the said Denver & Rio Grande Railway Company thereby agrees to pay or provide for all its debts incurred up to the time of delivery of possession thereunder, in excess of twenty-two thousand six hundred and sixty-four dollars per mile, and the said Atchison, Topeka, and Santa Fé Railroad Company has agreed to and accepted the terms of such lease in form and in substance, and in evidence thereof has likewise executed a counterpart of said instrument, and whereas it is in and by said instrument provided, that possession of the demised railway property should be surrendered and delivered by the said lessor company to the said lessee company, and the term thereby granted is to commence on the second day of December, eighteen hundred and seventy-eight.

Now this memorandum witnesseth that the parties to said instruments or leases have agreed that the same so executed shall be deposited with S. B. Schlesinger, of Boston, in escrow pending the performance, by the several parties hereinafter named, of the acts to be done and performed by them respectively. Whereas it is nec-

essary and advisable, in order to make such lease binding and effectual, that the same, and the terms thereof, should be ratified and confirmed by the stockholders of the lessor company and the directors of the lessee company, parties thereto.

I. Pending the ratification thereof by the stockholders or directors of said companies respectively.

And whereas in and by said lease the said Atchison, Topeka, and Santa Fé Railroad Company has agreed to pay in cash for the fuel, material, and supplies on hand at the time of delivery of possession of the demised property to it, at a price to be determined as in said lease provided, and it is intended that the money so to be paid is to be applied towards paying or providing for the said debt of the lessor company in excess of the amount of twenty-two thousand six hundred and sixty-four dollars per mile aforesaid.

II. Pending the deposit by the said Atchison, Topeka, and Santa Fé Railroad Company with S. B. Schlesinger, as trustee, of the money so to be agreed by it.

And whereas it is also intended as part of the entire plan that the capital stock of the Denver and Rio Grande Railway Company, consisting of eighty-five thousand shares of one hundred dollars each, shall, to the extent practicable, be controlled in the interest of the Pueblo and Arkansas Valley Railroad Company, and to that end William J. Palmer and Alden Speare have agreed substantially as follows: —

That the said William J. Palmer shall on or before the first day of December, eighteen hundred and seventy-eight, deposit forty-two thousand five hundred and ten shares of the capital stock of the Denver and Rio Grande Railway Company with T. Jefferson Coolidge, as trustee, and that the said Alden Speare shall likewise, on or before that day, deposit with said trustee eight thousand five hundred and two shares of one hundred dollars each

in the full paid stock of the Pueblo and Arkansas Valley Railroad Company.

III. Pending the deposit of said shares by said parties, respectively, on the second day of December, 1878, if by that time.

I. Said lease shall have been ratified as aforesaid.

II. And the Atchison, Topeka, and Santa Fé Railroad Company shall have deposited said moneys.

III. And the said William J. Palmer and Alden Speare shall respectively have deposited said shares

the said S. B. Schlesinger, trustee, shall deliver to each of said companies the instrument executed by the other under such other company's seal; but if, prior to said second day of December, 1878, the said lease shall not have been ratified by the stockholders of the lessor company and the directors of the lessee company, or either of them; or the said Atchison, Topeka, and Santa Fé Railroad Company shall not have deposited the said money; or the said William J. Palmer and Alden Speare, or either of them, shall not respectively have deposited the said shares, then the said S. B. Schlesinger shall continue to hold the said instruments in escrow, pending the performance, by the party or parties in default, of the act or thing by such party or parties respectively required to be performed; and thereupon immediately after the party or parties in default shall have done and performed the act of such party or parties respectively required, the said S. B. Schlesinger shall deliver such instruments as aforesaid, and when delivered in accordance herewith the said instruments shall thereupon immediately become and be of full force and effect from and after such delivery; but at the time said trustee shall deliver said instruments, he shall likewise pay over to the Denver & Rio Grande Railway Company, or any person by it authorized to receive the same, the money which the said Atchison, Topeka, and Santa Fé Railroad Company shall have deposited with

him as the price or value of the fuel, material, and railroad supplies on hand at the time of such delivery, to be applied to reduction of the debts of D. & R. G. Co., in excess of $22,664 per mile, it being the true intent and meaning of these presents, that ratification by the stockholders of the Denver and Rio Grande Railway Company, and by the directors of the Atchison, Topeka, and Santa Fé Railroad Company, of the lease as aforesaid, the deposit of the money by the said Atchison, Topeka, and Santa Fé Railroad Company, the deposit of said shares by William J. Palmer and Alden Speare respectively, are all parts of one transaction, and that the lease shall have no validity unless the parties named shall severally do and perform their respective parts, but that sufficient time shall be afforded them to do so.

(Signed) THE DENVER & RIO GRANDE R.W. Co.
by WM J. PALMER.

(Signed) THE ATCHISON, TOPEKA, AND SANTA FE R.R. Co.,
by THOS. NICKERSON.

Signed in presence of
(Signed) THEODORE V. H. MEYER.

K

Confirmation of Lease by the Atchison, Topeka, and Santa Fé Railroad Company: —

Copy of vote passed by the Executive Committee of the Atchison, Topeka, and Santa Fé Railroad Co., October 19, 1878.

Voted, That the lease offered to this company by the Denver and Rio Grande Railway Company for thirty years, from Dec. 1st, 1878, as submitted and read at this meeting, be approved and accepted, and that the president of this company is hereby authorized to execute said lease, and that the assistant secretary is authorized to attest the same and affix the seal of this company thereto.

Attest: GEO. L. GOODWIN,
Ass't Sec'y.

L

Confirmation of Lease on the Part of the Denver and Rio Grande Railway Company (Telegram):—

COLORADO SPRINGS, Nov. 30, 1878.

THOMAS NICKERSON:—

Have you notified Spencer of his appointment? Lease unanimously ratified yesterday. Seven millions stock represented.

(Signed) WM. J. PALMER.

M

DENVER, COLORADO, Dec. 27th, 1878.

THOS. NICKERSON, *Pres't A. T. & S. F. R.R'd Co.:*

Dear Sir,—As required by the terms of the lease of the Denver & Rio Grande Railway to the Atchinson, Topeka, and St. Fé R.R. Company, herewith please find schedules and valuation of property belonging to the Denver & Rio Grande R'y Co., at the date of delivery of the former to the latter company.

Schedule A, as per Article 7 of the lease, embraces the material and supplies on hand, and prices for which the same is to be paid for by the lessor, amounting to $142,163.23.

Schedule B embraces the list of rolling stock and equipment, and valuation of the same, which is to be redelivered, as per Article 11, to the lessor at the expiration of, or other determination of, the lease, amounting to $530,978.62.

It being considered advisable to also make list of all buildings and condition of the same, and side tracks including present length, a supplemental report will be made embracing these items.

The representative of the Atchinson, Topeka, and Santa Fé R. R'd Company making claim that certain bridges on the Cañon City branch of the Denver & Rio Grande

Railway are defective, that they have been frequently carried away, and are still liable to be injured by freshets and seriously interfere with the working of the road, an inspection of the same was made and evidence taken which supported the statement. The sum of $85,000 is allowed to be expended for iron bridges on stone abutments and piers at each of the four crossings of the Arkansas River, and raising the grade of the road-bed where necessary to place the track above high water. It being understood and agreed that, should the cost of the work be below the amount allowed, the actual cost of the same when completed, verified by the chief engineer of the Atchinson, Topeka, and Santa Fé Railroad Company shall be sent to each company and taken as the proper sum for future settlement of the account.

No further claim being made as to the condition of the leased road, it otherwise must be considered, as per Article 11 of the lease, in thorough running order and condition.

(S'd) A. C. HUNT,
Appraiser for D. & R. G. R'y Co.

(S'd) A. A. ROBINSON,
Appraiser for A. T. & S. F. R.R. Co.

(S'd) J. C. SPENCER,
Umpire.

Affidavit of M. D. Thatcher.

I, Mahlon D. Thatcher, of Pueblo, in the State of Colorado, of lawful age, on oath, depose and say:—

1. That I am one of the stockholders of the Denver and Rio Grande Railway Company.

2. That on Saturday, Feb. 8th, 1879, I handed to William J. Palmer, president of said railway company, a request in writing, signed by myself and other stockholders of said company, representing a majority of the capital stock of said company, a copy of which request, marked N, is annexed, to call a meeting of the stockholders of said company for the purposes in said request named. That said Palmer made no reply to said request, and has never called such meeting as so requested.

3. That I am and was, on or before Feb. 14, 1879, the duly appointed attorney of stockholders holding a majority of the capital stock of the Denver and Rio Grande Railway Company, to examine the books, records, and papers of said railway company, and as such attorney, on or about said 14th day of February, I called on said Palmer, and requested permission to make such examination, which request was refused, and I have not since been permitted to make such examination.

MAHLON D. THATCHER.

U.S. AMERICA, MASSACHUSETTS DISTRICT, ss.

March 6th, A.D, 1879, subscribed and sworn to by M. D. Thatcher, within named, before me.

ELIAS MERWIN,
Commissioner of U.S. Circuit Court for said district.

N

Request for Meeting of Stockholders of the Denver & Rio Grande Railway Company.

BOSTON, MASS., January 29, 1879.

WILLIAM J. PALMER, *President Denver and Rio Grande Railway Company, Colorado Springs, Colorado:*

Dear Sir,— We the undersigned, stockholders of the Denver and Rio Grande Railway Company, and owners of a majority of the stock of said company, hereby request you to call a meeting of the stockholders of said company, for the purpose of taking action as to whether any further expenditures shall be made in extensions of the line of road west of its present terminus at Cañon City, and for the purpose of taking corporate action to dismiss and discontinue the appeals now pending in the Supreme Court of the United States, numbered respectively 811 and 812 upon the docket of said court, and for the transaction of such further and other business as may legally come before the meeting.

We request that such meeting be immediately called, and held at a date not later than March 10, 1879, or as soon as lawfully may be.

Respectfully,

T. JEFFERSON COOLIDGE, *Trustee.*
ALDEN SPEARE.

The Atchison, Topeka and Santa Fé Railroad Company, by

THOS. NICKERSON, *President.*

The Pueblo and Arkansas Valley Railroad Company, by

JOS. NICKERSON, *President,*
LEE, HIGGINSON & CO.,
BREWSTER, BASSET & CO.,
F. L. HIGGINSON,
C. D. HEAD & T. H. PERKINS,
CHAS. A. WHITTIER,
M. D. THATCHER.

March 17. 79. Rec^d A. H. Swayne

Supreme Court of the United States, 1

OF THE OCTOBER TERM, 1878.

THE DENVER AND RIO GRANDE RAILWAY COMPANY, *Appellant*, *vs.* EBENEZER T. ALLING ET AL., *Respondent*.	*No.* 811. 2
THE CANON CITY AND SAN JUAN RAILWAY COMPANY, *Respondent*, *vs.* THE DENVER AND RIO GRANDE RAILWAY COMPANY, *Appellant*.	*No.* 812. 3

UNITED STATES OF AMERICA,
State of Pennsylvania,
District of Pennsylvania,
City and County of Philadelphia, } ss.:

Joseph D. Potts, being duly affirmed, says: I am a resident of Philadelphia, and citizen of Pennsylvania, of lawful age. I was invited to participate in the negotiations had with Atchison, Topeka and Santa Fe and Pueblo and Arkansas Valley

Railroad Companies, for the purpose of preventing the threatened construction by said companies, or either of them, or other corporation or individuals in their or either of their interests, of a railway parallel to and competing with the railway of theDenver and Rio Grande Railway Company, constructed and in operation at the time.

The negotiations were begun on the second day of October, 1878, in the City of Boston, Mass. Mr. Sebastin B. Schlesinger, of Boston, was associated with me in representing the interests of the parties interested in the Denver and Rio Grande Railway Company, Messrs. Thos. Nickerson, Joseph Nickerson and other members of the Boards of Directors of the respective companies, represented the interests of the Atchison, Topeka and Santa Fe and Pueblo and Arkansas Valley Railroad Companies.

5 The primary object was to ascertain a basis on which the Denver and Rio Grande Railway Company would consolidate with the Pueblo and Arkansas Valley Railroad Company, the Directors of the latter having, as I was informed and believe, passed a resolution with that end in view. In the course of the negotiations the plan of consolidation was totally abandoned because of the doubts counsel entertained in regard to its legality under the laws and constitution of the State of Colorado, in the territorial jurisdiction of which State the constructed railroads of the respective companies were and are situate, the Pueblo and Arkansas Valley Railroad Company being at the time a corporation existing under the laws of said State, as I was informed and believe.

6 Various plans were thereupon discussed with the object in view of preserving the separate corporate existence of the respective companies, and yet to make it the interest of the Atchison, Topeka and Santa Fe and Pueblo and Arkansas Valley Railroad Companies not to countenance aid and encourage directly or indirectly,the building in their or either of their interests of a railway parallel to and competing with the railway of the Denver and Rio Grande Railway Company, constructed and in operation between Denver and Pueblo and Cañon City. Traffic arrangements were proposed, discussed and rejected because Mr. Nickerson and others conducting the negotiations on behalf of the Atchison, Topeka and Santa Fe and Pueblo and Arkansas Valley Railroad Companies, believed

such arrangements could not be enforced and become per- 7
manent; finally the plan of a lease of the constructed railway of the Denver and Rio Grande Railway Company, to the Atchison, Topeka and Santa Fe Railroad Company, a Kansas corporation, was proposed, discussed, and finally on October 4th, 1878, adopted; and it was agreed that the lease should be made subject to existing indebteness of the Denver and Rio Grande Railway Company, incurred on account of the to be leased property; that debt otherwise incurred should be otherwise provided for by the Denver and Rio Grande Railway Company or its then stockholders, out of its assets other than the to be leased property.

The feature in the plan of an interchange of stocks was by Mr. Schlesinger and myself adopted, because we believed that with so large a junior interest in the hands of parties having large interests in the Pueblo and Arkansas Valley and Atchison, Topeka and Santa Fe Railroad Companies, the 8
senior interest, to wit, the bondholders' would be better secured, as by arbitrary use of its power, the Atchison, Topeka and Santa Fe Railroad Company, if it became the lessee of the Denver and Rio Grande Railway Company's constructed road, could easily adjust rates so that the leased property would not earn interest on the debts outstanding against it, and fixed at $2,664 per mile.

It was, however, understood that any stockholders of the Denver and Rio Grande Railway Company, who preferred to retain their stock, with its incidental rights, might do so.

There was no settlement of existing litigation or disputes contemplated or intended by the plan, which was finally re- 9
duced to writing, and signed on October 4th, 1878, by Mr. Thomas Nickerson, for the Atchison, Topeka and Santa Fe Railroad Company, by Mr. Joseph Nickerson, for the Pueblo and Arkansas Valley Railroad Company, and by Mr. Schlesinger and myself for the Denver and Rio Grande Railway Company.

Jos. D. Potts.

Affirmed and Subscribed before me, }
this 11th day of March, A. D. 1879, }

Harold Mann,

[SEAL.] *Notary Public.*

10 UNITED STATES OF AMERICA,
State of Massachusetts,
District of Massachusetts,
City of Boston,
} ss.:

Sebastian B. Schlesinger, being duly sworn, doth depose and say that: I reside in Boston, Massachusetts, and am of lawful age; I have read the above affidavit of Joseph D. Potts, and know the contents thereof, and the same is true to the best of my knowledge; on the eleventh day of February, 1879, I received a letter from Mr. Thomas Nickerson, dated February 10th, 1879, of which I annex a true copy, marked "A," and I also annex, marked "B," a copy of my answer thereto, dated February 15th, 1879, which answer contains correct statements of my true understanding and knowledge of the matter therein mentioned.

11 SEBASTIAN B. SCHLESINGER.

Subscribed and sworn to before me, on this twelfth day of March, in the year eighteen hundred and [SEAL.] seventy-nine, at the City of Boston, County of Suffolk, and State aforesaid.

JAS. B. BELL,
Notary Public.

(Copy.)

"A."

12 BOSTON, February 10, 1879.

S. P. SCHLESINGER, Esq.:

Dear sir,—Your favor of the 7th inst. is at hand.

I do not intend to undertake to refute the "harsh things" Gen'l Palmer and his friends have said about me. I am satisfied to wait for my justification till time shall show who is right.

I wish only to give a brief history of our transactions with the D. & R. G., while it is fresh in mind, and if I fall into any errors, I will thank you to correct them now.

Some time in September, Gen'l Paine received a letter from Col. Potts proposing that some of our people should go to New York and meet representatives of the D. & R. G., to see if

something could not be done to stop our competitive construction and *make peace.* 13

I called the board together at once and laid the matter before them. It was not thought advisable to go to New York, but to propose to meet any representative of said road in Boston. I then stated to the Board that I wished to know their views as to the terms on which I could treat with your friend on his arrival.

The whole situation was discussed for hours, and resulted in the unanimous passage of the following note, which was offered by General Paine: "That no proposition from the D. & R. G. "Railway Co. should be considered which contemplates "abandoning the extension from Pueblo to So. Arkansas or "Leadville, or the control thereof."

At our first interview, you urged that your company should be allowed to build to So. Arkansas, and I explained to you *why* we could not allow this to be done. If we had not been bound by contracts running with about 225 persons from whom we had collected assessments on an agreement to deliver stock and bonds of the P. & A. V. R. R. Co., I have no doubt this concession would have been made, for it was a matter of indifference to the A. T., & S. F. whether they leased this new road from the P. &. A. V. or the D. & R. G., but it was absolutely impossible to yield this ground to you, and I finally told your committee at the first interview that if this was your ultimatum, we should be compelled to withdraw. You finally yielded this point, as admitted by Col. Potts and yourself, and we agreed to stop construction from Pueblo to Canon City, and from Pueblo to Denver, and you agreed to stop construction from Canon City to Leadville, we to build narrow guage from Canon City, which was not agreeable to our people after we had purchased steel rails and made all our plans for *standard gauge,* so far we agree. 14 15

Did your committee contemplate at that time that we should pay your Co. for the right or privilege to build this road? If you did, why did you not raise that question then and talk of terms. If Palmer had contemplated this when he came on to carry out your agreement, why did he draw the clause in the Spear agreement that we should pay for any of his construction and materials which we should appropriate, and why did he agree to the clause in the lease which provides for the

16 manner in which earnings on this part of the line should be divided between the D. & R. G. and the P. & A. V. between Pueblo and Leadville.

The continuation of these law suits was an after thought with Palmer, and under them he is undertaking to wrong our company, and I am sorry to say that you and Mr. Potts appear to support him.

Mr. Potts expresses the opinion that Palmer "will win." This will be settled in March, and our opinion will not change the result.

I will venture to express the opinion that if Palmer does win, the Atchison will never buy from the D. & R. G. the right to build through the canon, at any price; they will submit to any loss sooner than submit to a wrong.

17 A word in reference to that vote of the P. & A. V. that they would consolidate "on liberal terms." This vote was offered and passed, and would have been carried out in good faith on our part, if the law had allowed, but it is easy to see that we might have *differed widely* as to what was liberal terms. I know that consolidation meant that the P. & A. V. must assume the debts of the D. & R. G. if that road was consolidated into it, but I do not suppose that we should have allowed anything for their stock, which was practically worthless. When we found we could not consolidate, then we sought to do the best we could, and was willing to allow a liberal price for the stock, which we did. Now having given for half of their stock P. & A. V. stock worth in the market $575,000 and agreed to take the balance and allow stock worth $575,000

18 or together..... ..... $1,150,000

Gen'l. Palmer and his friends now coolly ask us to guarantee his bonds, and buy our peace a second time; it would only open the door for some new fraudulent claim.

Col. Potts says the Atchison will lose the Canon, and see it for their interest to buy it, &c.; did it ever occur to you that the Atchison have no concern in this new war over the Canon; that if Palmer wins the suit and any loss falls on our side, it falls on the P. & A. V., and the effect will be to damage the P. & A. V. stock, in which the D. & R. G. may be interested to the extent of about a million dollars.

After much reflection I have come to the conclusion that

there is no course for us but to "fight it out on this line, if it takes all summer." 19

Yours, truly,

(Signed) THOMAS NICKERSON,
Pres't.

(Copy.)

"B."

February 15th, 1879.

THOMAS NICKERSON, Esq.,
President Atchison, Topeka and Santa Fe R. Rd.

Dear Sir,—I have your letter of February 10th, with regard 20
to the Atchison and Denver Railroads Companies, and the agreements between them. No one can regret more than I do, the present difference between General Palmer and yourself as to this matter. The present agreements, however, were made by himself and yourself personally, and have entirely superseded that signed by Colonel Potts and myself on behalf of the Denver Railroad Company. Without discussing your letter in detail, and not meaning thereby either to admit or to question the correctness of your narrative, but simply passing it by, I wish, in justice to General Palmer, to say a word on one point.

The lease of the Denver and Rio Grande Railroad Company conveys only the railroad heretofore constructed and operated by that company and describes it. 21

It distinctly promises that "all rights and privileges other than these (specified) were expressly reserved and exempted."

I understood at the time this agreement was made that this reserved and exempted from the lease the rights to make any and all extensions and new railroads, including that through the canon, which the Denver Company might have; and the language which I have quoted seems to me apt and explicit for this purpose. The agreement fixes the debt of the Denver Road at $22,664 per mile, but recognizes an existing debt in excess of this amount to be provided for by that Company and which the exempted rights and franchises—for they had no other exempted property—furnished the principal, if not the

only, means to provide for, if these franchises were of any value.

I cannot undertake to state what General Palmer said to you in conversation, but I do know that he stated to me and to his counsel that he must reserve the rights and franchises enumerated above, and gave the reasons (already stated) for the reservation; and I am quite confident that enough on this point was stated in presence of your counsel, to indicate General Palmer's purpose in this regard, But without this, and assuming that he said nothing but what is in the lease, and which I have quoted, these clauses, which he did cause to be inserted, and which he insisted on, seems to me to declare his purpose, to state what he leased and what he kept with unmistakable clearness.

If I had any thought about it at the time, it was that *he* re-
23 garded the franchises he retained as valuable, and you thought them substantially worthless; and it seems to me that while he holds them now with tenacity, as he has a right to under the lease, as I read it, your view as to their value has been materially modified.

What he is doing in the matter, however, is his own action, and not mine. The responsibility and credit are both with him, and while I regret the difference, I can do nothing in the premises, but put before you, as I have endeavored very briefly to do, a statement of what seems to me General Palmer's position and rights under the agreement between your respective roads. I shall transmit a copy of this letter to Col. Potts. and request him to express his views, if he has any to give, to
24 you direct.

Very truly yours,

(Signed.) SEBASTIN B. SCHLESINGER.

SUPREME COURT OF THE UNITED STATES, 25

OF THE OCTOBER TERM, 1878.

THE DENVER AND RIO GRANDE RAILWAY COMPANY,
Appellant,
vs.
EBENEZER T. ALLING, ET AL.,
Respondents.
No. 811.

26

THE CANON CITY AND SAN JUAN RAILWAY COMPANY,
Respondent,
vs.
THE DENVER AND RIO GRANDE RAILWAY COMPANY,
Appellant.
No. 812

27

UNITED STATES OF AMERICA,
State of Massschusetts,
District of Massachusetts,
City of Boston, } ss.:

I, Thornton K. Lathrop, do depose and say, that I am a counsellor at law in the City of Boston, State of Massachusetts; I was employed with William G. Russell, Esq., of this City, a counsellor at law, by and on behalf of General Wm. G. Palmer and the Denver and Rio Grande Railway Company in drafting the memorandum of agreement dated October 4th, 1878, made between that company, acting by Messrs. Potts & Schlesinger, and the Acthison, Topeka and Santa Fe Railroad Company, and

28 the Pueblo and Arkansas Valley Railroad Company, acting by their respective presidents; I have read the affidavit of Joseph D. Potts, Esq., made in this cause, and dated March 11th, 1879, with relation to that memorandum, and it substantially conforms to my recollection of that matter.

On the 8th of October, A. D. 1878, the first draft of a lease from the Denver and Rio Grande Railway Company to the Atchison, Topeka and Santa Fe Railroad Company was began at my office in Boston. George C. Shattock, Esq., Counsellor at Law, was present as the adviser of the Atchison Railroad, and Mr. Meyer of New York, who had come on at Gen'l Palmer's request, as his counsel, was there, and myself. Mr. Russell was not there. Portions of the proposed draft were taken down by a stenographer from Mr. Shattock's dictation. This draft
29 I have no copy of. It was taken, I think, by Mr. Meyer, who subsequently (on Thursday, October 10th, 1878) submitted a new draft in writing, which was considered and discussed by all the counsel engaged in the matter, and the parties themselves. Various modification and alterations, were made on this, and on Saturday evening, October 12th, 1878, the draft as amended was given to the counsel of the Atchison Road to be printed. All the printing of all the drafts, including that of the paper as finally perfected, was done under the supervision of the counsel of the Atchison Railroad, and the copies furnished the other counsel and parties were received through them. These copies were furnished to all the counsel and to General Palmer and Mr. Nickerson, and as amendments were agreed to, fresh copies of the paper as amended were struck
30 off. I find I have copies of these papers marked respectively Oct. 14, 1878; Oct. 16, 1878; Oct. 17, 1878; Oct. 18, 1878; Oct. 19, 1878, five different papers in all, besides the perfected draft which was also completed on the afternoon of the last named day, and which contains alterations from the draft which I received the same morning. I annex all these papers showing in pencil in the margin the successive alterations suggested and discussed, and which, so far as they were agreed to, appear in the next printed draft. These papers are marked respectively Oct. 14, 1878, T. K. L. (1); Oct. 16, 1878, T. K. L. (2); Oct. 17, 1878, T. K. L. (3); Oct. 18, 1878, T. K. L. (4); Oct. 19, 1878, T. K. L. (5); Oct. 19, 1878, T. K. L. (6). Perfected draft.

The granting clause in these papers was never altered after

the first draft was sent to the printers, October 12th, 1878, except by inserting the words "exclusive of sidings" in the eleventh line, after the words "more or less," and the words "machinery and tools" after the word "shops" in the last line but one. The proviso following was never changed in phraseology from the time it first went into the printer's hands. 31

The provisions of the third article of the paper were the subject of repeated discussions, both as to form and as to substance; the various drafts hereto annexed show the original form of this article and the various modifications suggested from time to time, and the language finally adopted in the perfected draft. General Palmer instructed me at the outset of the business that his purpose was to lease nothing but the constructed railroads of his company, and to reserve the right to extensions, &c. It was stated in the paper that the aggregate debts of the Denver and Rio Grande Railway Company did not exceed $22,664 per mile of constructed road, while the fact that the debt did actually exceed this amount was also recognized, and it was provided that the Denver and Rio Grande Railway Company should pay this excess. General Palmer distinctly told me that he relied on the rights and franchises reserved as something to enable his company to meet this obligation, and spoke repeatedly during the negotiations about the importance of reserving them for this purpose. 32

THORNTON K. LOTHROP.

Subscribed and sworn to before me, on this twelfth day of March, in the year eighteen hundred and seventy-nine, at the City of Boston, County of Suffolk and State of Massachusetts, 33

[SEAL.] JAS. B. BELL,
Notary Public.

34 SUPREME COURT OF THE UNITED STATES,

OF THE OCTOBER TERM, 1878.

THE DENVER AND RIO GRANDE RAILWAY COMPANY, *Appellant*,
vs.
EBENEZER T. ALLING, ET AL., *Respondents*.
No. 811.

35

THE CANON CITY AND SAN JUAN RAILWAY COMPANY, *Respondent*,
vs.
THE DENVER AND RIO GRANDE RAILWAY COMPANY, *Appellant*.
No. 812.

UNITED STATES OF AMERICA,
State of Massachusetts,
36 District of Massachusetts, } ss.:
City of Boston,

William G. Russell, being duly sworn, doth depose and say: I am an attorney and counsellor at law, residing and doing business at Boston, Massachusetts. On the 4th day of October, 1878, at the request of Mr. Sebastian B. Schlesinger, I attended as his counsel, with Mr. Thornton K. Lothrop as my associate, a meeting of parties interested in the Atchison, Topeka and Santa Fe Railroad Company, and the Denver and Rio Grande Railway Company, at the office of Mr. Thomas Nickerson, the President of the first named corporation. Mr. Shattuck and Mr. Holmes as counsel for that corporation

were present. I was present from about 2 P. M. to 4½ P. M. at 37
that meeting.

While I was present, a draft or memorandum of agreement, purporting to be between the said two corporations and the Pueblo and Arkansas Valley Railroad Co., was partially drawn and agreed upon by the representatives of said corporations.

As I knew nothing of the subject matter of the agreement or the locations or connections of the several roads, or of the chartered powers of the contracting parties, or of the legislation of the States in which they existed previous to my attending that meeting, I took no part in the proceedings, except to assist as best I could, from the information and instructions then given me, in framing the agreements of the parties as then stated, and I left before the draft was completed, declining to assume any responsibility as to the validity or propriety 38
of the agreement so far as it was then drawn. I learned from the parties that the memorandum was completed and signed on that date, and it, or a copy of it, was subsequently before me, and used and referred to in preparing the lease hereinafter mentioned, and in the discussions attendant thereon. On the 10th of October, 1878, I was employed by Mr. Wm. J. Palmer as counsel to advise and aid in the preparation of the draft of a lease between the Denver and Rio Grande Railway Co. and the Atchison, Topeka and Santa Fe Railroad Co. A printed copy of the draft as finally completed is annexed to the affidavit of Thornton K. Lothrop in these causes, and is identified by me by my signature.

In the preparation of this draft I was engaged from Oct. 10th to Oct. 19th, a part of each day, and on most days for a 39
large part of each day in conference with Mr. Palmer and Messrs. Lothrop & Meyer, his counsel, and in conferences and discussions with Mr. Shattuck and Mr. Holmes, the counsel of the Atchison, Topeka and Santa Fe Railroad Company. Mr. Thomas Nickerson was also present at one or more interviews with said counsel.

I have read the affidavit made in these causes by Mr. Thornton K. Lothrop, and his account therein given of the preparation of the various drafts of said lease and the amendments and alterations therein, and of the printing thereof and submission of the same to counsel and parties for examination is correct and true, and the various printed proofs received and

examined by us on the several days stated in his said affidavit are identified by my signature.

I know that the proposition was distinctly made and discussed in the course of the negotiations as to the form of the lease, that it should embrace only the then constructed road of the Denver and Rio Grande Railway Company; and that it should not include the franchises of the said company for other roads or extensions.

W. G. RUSSELL.

Subscribed and sworn to before me, on this twelfth day of March, in the year eighteen hundred and seventy-nine, at the City of Boston, County of Suffolk, and State of Massachusetts,

[SEAL.] JAS. B. BELL,
Notary Public.

SUPREME COURT OF THE UNITED STATES, 42

OF THE OCTOBER TERM, 1878.

THE DENVER AND RIO GRANDE RAILWAY COMPANY,
Appellant,
vs.
EBENEZER T. ALLING ET AL.,
Respondents.
} *No.* 811.

43

THE CANON CITY AND SAN JUAN RAILWAY COMPANY,
Respondent,
vs.
THE DENVER AND RIO GRANDE RAILWAY COMPANY,
Appellant.
} *No.* 812.

UNITED STATES OF AMERICA,
State of New York,
Southern District of New York,
} ss. :

44

City and County of New York, ss. :

I, Charles F. Woerishoffer, having been first duly sworn, on oath doth depose and say : I reside in the City of New York, doing business as a banker, and am of lawful age.

I became the owner to a large amount of the Denver and Rio Grande Railway Company stock, at sometime in September, 1878 ; I know of certain negotiations had in Boston with parties in the interest of the Atchison, Topeka and Santa Fe and Pueblo and Arkansas Valley Railroad Companies, which terminated in agreeing upon a form of lease, and the interchange of stocks, to an amount not exceeding 42,510 shares of

45 the Denver and Rio Grande Railway Company stock, unless parties holding Denver and Rio Grande Railway Company stock desired to make further exchange; as I was also the holder of bonds of the Denver and Rio Grande Railway Company to a large amount, and desired to prevent the building of a railway parallel to, and competing with, the constructed road of the Denver and Rio Grande Railway Company, which was subject to the mortgage securing payment of the bonds I held, I facilitated the consummation of the lease, by depositing a portion of my stock with William J. Palmer, as Trustee; I understood at the time that stock to the amount of 42,510 shares only would be exchanged, unless General Palmer deemed it for the best interest of all concerned to make further exchanges, and if no further exchange
46 was made within a year, from December 2d or 3d, 1878, I retained a beneficial interest in so much of Denver and Rio Grande Railway Company stock as I should hold certificates of deposit, as would bear the same proportion to the number of shares thereby evidenced to have in deposit as the number of shares deposited with Mr. Palmer, under the trust, and not exchanged, should bear to the entire aggregate amount of shares deposited with him, and that for the difference between that amount and the amount I had deposited, I should have the beneficial interest in a proportionate amount in the stock of the Pueblo and Arkansas Valley Railroad Company, received in exchange; I always believed that the rights incidental to the Denver and Rio Grande Railway Company's stock would be strictly preserved, and its assets be made available
47 to pay off the indebtedness over and above $22,664 per mile of constructed road; and relying thereon, I have since purchased Denver and Rio Grande Railway Company stock, and deposited the same with Mr. Palmer; I now hold 700 shares of said stock which I prefer to retain, since attempts have been made to impair the assets of the company, and to shear the stock on deposit with Mr. Palmer of its inherent rights, so as to compel him to make further exchanges; I have read the form of lease, the escrow agreement, and the agreement between Messrs. Palmer and Speare, and acted on what was, and is my understanding thereof, as a business man; I never understood that these suits were settled, or to be settled, but on the contrary, I always understood and believed, that the

agreement between Messrs. Palmer and Speare, had for its 48
main object, to fix a minimum which the stockholders of the Denver and Rio Grande Railway Company, if they so elected, would receive at all events, even assuming that the decrees in these suits were affirmed on appeal, and that all exchanges beyond 42,510 shares were to be entirely optional, and whether further exchanges would be made, depended mainly upon the result of the issues involved on these appeals, and the relative value of said stocks would respectively have no consequence.

On deposit of shares of the Denver and Rio Grande Railway Company's stock with him, Mr. Palmer issued certificates of trust, which are bought and sold in open market in New York, and I know, it is generally believed and understood, that such trust certificates are so dealt in, with the same understanding, as I hereinbefore stated, and entitled the holder to 49
all results, in the same manner as if each holder had originally deposited shares of Denver and Rio Grande Railway Company stock with Mr. Palmer, to an amount equal to the amount mentioned in such certificate; I have, myself, since December, 1878, largely bought and sold such certificates with that understanding, and I now hold certificates evidencing the deposit with said Palmer, of a large amount of Denver and Rio Grande Railway Company stock.

I was requested by Mr. Palmer, in December, 1878, in conjunction with Mr. S. B. Schlesinger, to confer with Mr. Thomas Nickerson, of the Atchison, Topeka and Santa Fe Railroad Company, respecting certain differences which had arisen.

The form of lease provided for delivery of possession on December 2nd, 1878, while another papers imultaneously made, 50
provided for the deposit of the lease in escrow, pending the performance of certain acts, among them the deposit by the Atchison, Topeka and Santa Fe Railroad Company, of money to the amount of the price fixed by appraisement for fuel, material, and supplies which the Atchison, Topeka and Santa Fe Railroad Company had agreed to purchase from the Denver and Rio Grande Railway Company. Owing to a delay in appointing appraisers, and an umpire, which, as far as I know, and am informed and believe, was not chargeable to Mr. Palmer; this price had not been fixed, and the Atchison, Topeka and Santa Fe Railroad Company had not deposited the money. Until such deposit, the price to be paid as aforesaid, the lease

could not be delivered, under the provision of the paper of deposit, which paper also specifically provided that, until all the acts thereby required to be done, among them the deposit of this money had been done, the lease should have no validity.

As laches were claimed on both sides, I proposed a compromise, which I incorporated in a letter to Mr. Nickerson, of which I annex a copy marked VIII.; I received in reply a letter from Mr. Nickerson, of which I annex a copy marked IX.; I am informed, and believe, that the appraisement is not finished, and that payment of the money has not been made to the Denver and Rio Grande Railway Company, except the payment on account mentioned in Mr. Nickerson's letter; that the lease has not been delivered, but is still held in escrow upon the terms of the paper of deposit. I understood at the time of my conference with Mr. Nickerson, that the delivery of possession was made and taken subject to the lease becoming valid, and that in the meantime, the property was to be operated upon the same terms and conditions as in the lease provided.

I know that Mr. Palmer, in the interest of his trust, and the Denver and Rio Grande Railway Company's stockholders generally, is opposing legal proceedings to dismiss these appeals and I heartily indorse and approve of his action.

CHARLES F. WOERISHOFFER.

Subscribed and sworn to before me, this thirteenth day of March, A. D., 1879.

THOS. T. EVANS,
Notary Public,
Kings and New York Counties, N. Y.

Thomas T. Evans,
Notary Public,
New York.

(Copy.) 54

VIII.

BOSTON, December 13th, 1878.

THOMAS NICKERSON, Esquire,

President, Atchison, Topeka and Santa Fe R. R.:

DEAR SIR,—I have received telegrams from Gen. Palmer, authorizing me to say that without regard to the stipulations in the escrow agreement, in the hands of Mr. Schlesinger, he is ready to deliver at once possession of the Denver and R. G. R. R., upon the following terms and conditions:

First.—You are at once to telegraph to Mr. Strong, and Mr. Spencer, the umpire, that the appraisal of supplies, material, 55
&c., is to proceed with all the dispatch that Mr. Spencer thinks possible, and are also to deposit with Mr. Schlesinger the sum of $150.000, to secure payment for material, supplies, &c., delivered.

Second.—Genl. Palmer on being telegraphed to that these two things have been done, is to deliver to you immediate possession of the D. and R. G. R. R., and complete the transfer to Mr. Coolidge, of the D. and R. G. R. R. stock, as provided for in the agreement with Mr. Speare, and on receipt by Mr. Coolidge, Mr. Schlesinger and yourself, of telegrams from Gen. Palmer, Mr. Strong and Mr. Jackson, that the railroad has been delivered and the stock transferred, Mr. Schlesinger shall at once pay to Genl. Palmer, or his order, the sum of $75,000, on account of such supplies and materials, and shall also, di- 56
rectly he is informed by Mr. Spencer by telegraph of the total amount of the appraisal, pay at once to Genl. Palmer the balance found due the D. and R. G. R. R., without any rebate or offset, or counterclaim on the part of the A., T. and S. F. R. R., and return the remainder in his hands, if there is any, to your company.

Third.—All the stipulations in the lease as to the delivery of possession, the right to earnings, &c., shall read as if the date named therein were the 13th, and not the 2d day of December, and the D. and R. G. R. R. shall deposit on the 1st of February, 1879, the proportion of interest on their bonds

57 to December 13th, 1878, instead of to December 1st, 1878 (one-twelfth), as provided in the last clause of Article A of the lease. But in all other respects the lease shall be unaffected. Upon learning by letter from you that your company accepts this proposal, I will at once telegraph Gen. Palmer that the matter is concluded, and he will be prepared to deliver the road to-day.

Yours respectfully,

C. F. WOERISHOFFER.

(Copy.)

58 **IX**

Office of the
ATCHISON, TOPEKA AND SANTA FE R. R. Co.

BOSTON, December 13th, 1878.

C. F. WOERISHOFFER, Esquire:

DEAR SIR.—Your letter of this date is received, and contents are fully noted.

I accept your offer, with the following qualifications, viz.:

I will make a special deposit with Mr. S. B. Schlesinger, of $75,000 and one executed copy of the lease, with the proviso that if the railroad is not delivered on or before the 14th inst., he shall return the $75,000 and the lease to me, on demand,
59 but if the road is so delivered, then the $75,000 shall be held as payment on account of supplies, under clause seven of lease, and may be paid at once to W. J. Palmer, President, to be applied by him as provided under clause seven of said lease.

The executed lease is also to be held under the escrow agreement. I will also make the further special deposit of $75,000, which shall be held to pay for any balance that may be due for supplies under clause seven of lease.

Yours truly,

THOMAS NICKERSON,
Pres't.

(Copy.) 60

BOSTON, December 13th, 1878.

C. F. WOERISHOFFER, Esquire :

DEAR SIR,—I have this day telegraphed to Wm. B. Strong, at Colorado Springs, the following : "Hasten appraisal of sup-"plies under clause seven of lease, as fast as possible. When "road is delivered you under lease telegraph me at once, and "repeat dispatch."

Yours truly,

THOMAS NICKERSON,

Pres't. 61

Supreme Court of the United States. 1

OF THE OCTOBER TERM, 1878.

THE DENVER AND RIO GRANDE RAILWAY COMPANY,
Appellant,
vs.
EBENEZER T. ALLING ET AL.,
Respondents.

No. 811.

2

THE CANON CITY AND SAN JUAN RAILWAY COMPANY,
Respondent,
vs.
THE DENVER AND RIO GRANDE RAILWAY COMPANY,
Appellant.

No. 812.

UNITED STATES OF AMERICA,
State of Pennsylvania,
Eastern District of Pennsylvania,
City and County of Philadelphia, } ss.:

3

I, Isaiah V. Williamson, being first duly affirmed according to law, doth depose and say—

I reside in the city of Philadelphia, State of Pennsylvania, and am a citizen of said State, and of lawful age.

I own in my own right three hundred and thirty (330) shares in the capital stock of the Denver and Rio Grande Railway Company, par value, $100 each.

I have been informed, and believe, that controversies exist between that company and the Canon City and San Juan Railway Company and Pueblo and Arkansas Valley Railroad Company respecting the right of way through the Grand Canon of the Arkansas for a railway; that during the summer of 1878 a decision was rendered adverse to the Denver and Rio Grande Railway Company, and that the latter company appealed. It is my belief, from the knowledge and information I have on the subject, that questions of great consequence to the Denver and Rio Grande Railway Company and its stockholders are involved in such appeal. I never knew of any proceedings whereby the rights of the Denver and Rio Grande Railway Company respecting said right of way became identified with the right of any other company. I received Mr. Palmer's circular letter of November 11th, 1878. I have not exchanged the stock I hold, as therein proposed, and prefer to continue to hold the Denver and Rio Grande Railway Company's stock I own and its incidental rights. I became the owner of said railway stock at different times during several years past, beginning in January, 1874, and made such investment largely relying upon the rights that company was supposed to have under the acts of Congress, approved June 8th, 1872.

I. V. WILLIAMSON.

Subscribed and affirmed to before me, this fifteenth day of March, A. D. 1879. Witness my hand and official seal at the City and County of Philadelphia aforesaid.

[SEAL] WARREN G. GRIFFITH,

A Notary Public of the Commonwealth of Pennsylvania in and for the City and County of Philadelphia.

SUPREME COURT OF THE UNITED STATES

Of the October Term, 1878.

THE DENVER AND RIO GRANDE RAILWAY COMPANY, *Appellant*,
vs.
EBENEZER T. ALLING, et al., *Respondents*.
No. 811.

THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY, *Respondent*.
vs.
THE DENVER AND RIO GRANDE RAILWAY COMPANY, *Appellant*.
No. 812.

UNITED STATES OF AMERICA,
STATE AND DISTRICT OF COLORADO,
EL PASO COUNTY. } ss.

William Wagner being duly sworn doth depose and say:

I reside at Colorado Springs, Colorado, and am of lawful age. Ever since February 1st, 1878, I have been and am now Secretary of the Denver and Rio Grande Railway Company; I am the custodian of the corporate seal of the company and of all deeds, contracts and agreements made and entered into by said company; also of the minute books and other records of the company, except such as exclusively belong to the business of said company's railway. I have attended every meeting of the directors and stockholders of said company since I became secretary; the Board of Directors consists of five members, of which a majority constitute a quorum.

Hereto annexed, marked I, is a true copy of a resolution unanimously adopted at a meeting of the Board of Directors of said company held pursuant to adjournment on November 5th, 1878, at the company's office at Colorado Springs, Colorado, at which were present A. C. Hunt, Chas. B. Lamborn and Wm. Wagner, directors.

Hereto annexed, marked II, is a true copy of a resolution unanimously adopted at the annual meeting of the stockholders of said company held pursuant to call on November 29th, 1878, at 12 o'clock, m., at the company's office at Colorado Springs, and at which meeting there were represented in person and by proxy 69,713 3-4 shares out of 85,000 shares of the capital stock of said company actually issued at the time; at said meeting there were also unanimously elected as directors for the ensuing term: Messrs. Wm. J. Palmer, Wm. A. Bell, Chas. B. Lamborn, A. C. Hunt and William Wagner.

The paper in said resolutions referred to, is not annexed thereto, a true copy thereof being annexed to the affidavit of Wm. J. Palmer, marked "D."

Hereto annexed, marked III, is a true copy of a resolution unanimously adopted at a meeting of the Board of Directors of said company, duly called, held at the office of the company at Colorado Springs on December 3rd, 1878, at which were present Wm. J. Palmer, Wm. A. Bell, Wm. Wagner and Chas. B. Lamborn, directors.

Hereto annexed, marked IV, is a true copy of a resolution unanimously adopted at an adjourned meeting of the stockholders of the company held at the office of the company at Colorado Springs December 3rd, 1878, at which meeting there were represented in person and by proxy 70,977 3-4 shares out of 85,000 shares of the capital stock of said company actually issued at the time.

Hereto annexed, marked V, is a true copy of a resolution unanimously adopted by the directors at a meeting of the

Board held at the company's office at Colorado Springs on December 10th, 1878, pursuant to adjournment, a quorum being present.

Hereto annexed, marked VI, is a true copy of a resolution unanimously adopted at an adjourned meeting of the stockholders of the company held at the company's office at Colorado Springs December 10th, 1878, at 3 o'clock, p. m., at which meeting there were represented in person and by proxy 70,977 3-4 shares of stock out of 85,000 shares of capital stock actually issued at the time.

And hereto annexed, marked VII. is a true copy of a resolution adopted unanimously by the Board of Directors at a meeting duly called, held at the office of the company at Colorado Springs, on February 7th, 1879, a quorum being present.

The resolutions aforesaid remain in full force and effect at this time. There is no contract or agreement, whatever, between the Denver and Rio Grande Railway Company and the Pueblo and Arkansas Valley Railroad Company.

There is no contract or agreement, whatever, between the Denver and Rio Grande Railway Company and the Canon City and San Juan Railway Company.

I am also custodian of the stock ledger, transfer books, stock certificate books and stock list of said Denver and Rio Grande Railway Company and charged with the duty of countersigning all stock certificates and affixing the corporate seal thereto

On March 1st, 1879, the said Denver and Rio Grande Railway Company had actually issued 85,000 shares of stock, standing in the names of 246 different parties on the books of the company, represented by 513 certificates outstanding.

The holders of such stock are widely scattered over six different sovereignties of Europe, and at least twelve different

States of the Union. I am acquainted with the customs prevailing in stock transactions at the principal money markets, and know that the power of attorney to transfer shares of stock represented by stock certificates endorsed thereon, are often signed in blank by the person in whose name such stock stands on the books of the company, and so endorsed pass from hand to hand without being actually transferred on the books of the company.

It appears by the books of the company that Mr. Henry McAllister, Jr., of Colorado Springs, Colorado, has ever since 1871, been, and is now, a stockholder of said Denver and Rio Grande Railway Company.

WM. WAGNER,

Subscribed and sworn to before me this tenth day of March, 1879.

ERNEST P. STEPHENSON,

Notary Public, El Paso Co.

[NOTARIAL SEAL.]

I.

Resolved, That the proposed lease of the constructed line of the Denver and Rio Grande Railway as set forth in the printed copy of the same hereto annexed be and the same is hereby confirmed, ratified and approved and that W. J. Palmer, President and Walter Hinchman Asst. Secretary are hereby authorized and directed to execute the same: Provided, however, that said lease shall not become effectual until possession thereunder shall be given to the lessee by order of the President of this company in accordance with the escrow agreement of October 19th, 1878, between this company and the Atchison, Topeka and Santa Fe Railroad company, whereby said lease was to be deposited in escrow pending the performance of certain acts as therein mentioned, which escrow agreement is hereby ratified and confirmed and declared to be the act of this company.

II.

Resolved, That the proposed lease of the present constructed Railway of this company be and the same is hereby ratified and confirmed in form following, to wit: Provided, however, that inasmuch as certain acts are first required to be done and the less e company is first required by said lease to deposit a certain sum for supplies and property, to be ascertained as therein stipulated, possession under said lease shall not be given to the lessee until the President shall direct.

III.

Whereas, Certain suits are now pending undetermined involving questions as to the rights which inhere in and belong to this company to take possession of, survey, locate, construct and maintain its railway from Cañon City along up the valley of the Arkansas river through the big Cañon thereof and thence along said valley to the mouth of the South Arkansas river and thence further up the said valley

to California Gulch, to the exclusion of any other person or corporation from the property and right so inhering in and belonging to it, two of which suits are now depending on appeal in the Supreme Court of the United States in one of which the Canon City and San Juan Railroad Company is party plaintiff and this company is party defendant, and in the other of which this company is plaintiff and Ebenezer T. Alling and others are defendants in the original bills, and a third of which suits is now depending in the Circuit Court of the United States for the District of Colorado in which this company is plaintiff and the Pueblo and Arkansas Valley Railroad Company is party defendant, and a cross bill having been filed by said last named defendant against this company defendant therein which two suits are depending together, and

Whereas, The questions immediately involved in those suits are of great importance to this company and to all its stockholders and creditors as affecting the pecuniary value of its property and rights along and over the particular right of way and territory which is within the limits of the issue made in said suits and its right to exclude and eject the persons and parties adversary to it in said suits from its said right of way, rights and property, and

Whereas, The rights and property which inhere in and belong to this company hereinbefore mentioned are but part and parcel of the rights and property granted and confirmed to this company by the acts of Congress through and by which it derives its title to the same, and it is of great importance to this company that a judicial decision be had from the court of last resort upholding and confirming to this company its rights, privileges, powers and property as claimed by it in said suits thereby increasing the pecuniary value of its franchises and rights to build the unconstructed line named in its charter or certificate of Incorporation, and

Whereas, Certain agreements, covenants and obligations have been entered into between this company and other

persons in regard to said right of way, rights and property for the mutual benefit of the company and such persons who have thereby acquired vested interests and rights therein, therefore

Resolved, That the utmost diligence be exercised by this company, its officers, attorneys and agents in the prosecution of each and every one of said suits to a successful and final determination, and to the final execution of the judgments to be therein rendered respectively, and

Resolved, That there shall be no abandonment of either of said suits or delay whatever in such prosecution thereof, and the same shall be brought to a final judgement and determination at the earliest practicable time to the end that the rights, privileges and properties of this company be guaranteed and secured to it.

IV.

Whereas, Heretofore and on this 3rd day of December, 1878, the Board of Directors adopted a certain Preamble and Resolutions in the following terms:

Whereas, Certain suits are now pending, undetermined, involving questions as to the rights which inhere in and belong to this company to take possession of, survey, locate, construct and maintain its railway from Cañon City along up the valley of the Arkansas River through the big canon thereof, and thence along said valley to the mouth of the South Arkansas River, and thence further up the said valley to California Gulch, to the exclusion of any other person or corporation from the property and rights so inhering in and belonging to it, two of which suits are now depending on appeal in the Supreme Court of the United States, in one of which the Cañon City and San Juan Railroad company is party plaintiff and this company is party defendant, and in the other of which this company is plaintiff and Ebenezer T. Alling and others are defendants in the original bills, and a third of which

suits is now depending in the circuit court of the United States for the District of Colorado in which this company is plaintiff and the Pueblo and Arkansas Valley Railroad company is party defendant, and a cross bill having been filed by said last named defendant against this company, defendant therein, which two suits are depending together; and,

Whereas, The questions immediately involved in those suits are of great importance to this company and all its stockholders and creditors as affecting the pecuniary value of its property and rights along and over the particular right of way and territory which is within the limits of the issue made in said suits and its right to exclude and eject the persons and parties adversary to it in said suits from its right of way, rights and property; and,

Whereas, The rights and property which inhere in and belong to this company hereinbefore mentioned are but part and parcel of the rights and property granted and confirmed to this company by the acts of congress through and by which it derives its title to the same and it is of great importance to this company that a judicial decision be had from the court of last resort upholding and confirming to this company its rights, privileges, power and property as claimed by it in said suits, thereby increasing the pecuniary value of its franchises and rights to build the unconstructed line named in its charter or certificate of incorporation; and,

Whereas, Certain agreements, covenants and obligations have been entered into between this company and other persons in regard to said right of way, rights and property for the mutual benefit of the company and such persons who have thereby acquired vested interests and rights therein: therefore,

Resolved, That the utmost diligence be exercised by this company, its officers, attorneys and agents in the prosecution of each and every one of said suits to a successful and final determination and to the final execution of the judgments to be therein rendered respectively; and,

Resolved, That there shall be no abandonment of either of said suits or delay whatever in such prosecution thereof, and the same shall be brought to a final judgment and determination at the earliest practicable time to the end that the rights, privileges and properties of this company be guaranteed and secured to it.

And we, the stockholders, appreciating the importance to all persons interested in this company as stockholders, creditors or otherwise, that there should be an early and favorable judicial determination of such suits, do hereby

Resolved, That the aforesaid preamble and resolutions are ratified by us, approved and confirmed, and we hereby direct and instruct the Board of Directors and its successors until such suits are brought to final determination, judgment and execution to conform their action to the said resolutions and to the policy therein defined and set forth.

V.

Resolved, That the President be and he is hereby authorized and directed to deliver possession of the road to the Atchison, Topeka and Santa Fe Railroad Company under the lease heretofore ratified as soon as the terms and conditions of a certain agreement under which said lease and other papers were deposited with S. B. Schlesinger, of Boston, in escrow, shall have been complied with.

VI.

Resolved, That the President be and he hereby is authorized and directed to deliver possession of the road to the Atchison, Topeka and Santa Fe Railroad Company under the

lease heretofore ratified as soon as the terms and conditions of a certain agreement under which said lease and other papers were deposited with S. B. Schlesinger of Boston, in escrow, shall have been complied with.

VII.

Whereas, Certain causes are pending in the United States Supreme Court on appeal from the Circuit Court for the District of Colorado, to-wit:

THE DENVER AND RIO GRANDE RAILWAY COMPANY, *Appellant,*
vs.
EBENEZER T. ALLING, *et al.,* *Appellees.*

THE CANON CITY AND SAN JUAN RAILWAY COMPANY, *Appellee.*
vs.
THE DENVER AND RIO GRANDE RAILWAY COMPANY, *Appellant.*

The said causes having been submitted upon printed arguments by stipulation of the parties in pursuance of the rules and practice of the Court.

And Whereas, Notice has been given by Chas. E. Gast, Solicitor for the said Appellees, and E. R. Hoar, Solicitor for the Atchison, Topeka and Santa Fe Railroad Company, and of counsel, of a motion to be presented to said Court on behalf of said parties, on the third Monday of March next, that the stipulation for the submission of the causes upon printed

arguments, may be cancelled and discharged, and the said printed arguments may be withdrawn from the files; and that the Atchison, Topeka and Santa Fe Railroad Company may be allowed to intervene and take charge and disposal of said causes in the name and on behalf of the appellants therein, that it may give the consent of the appellants to the dismissal of the appeals.

Resolved, That the said motion is hostile to the interests of this Company, and founded upon a false assumption of the facts; that the President and legal officers of the Company be instructed to oppose it; to employ all legal means to defeat it; to prevent the dismissal of said causes and the intervention therein for any purpose of any company or person, ot a party to the record; and to resist all attempts of others to interfere with the management of the legal proceedings and affairs of the company, and to prosecute the said causes with the utmost diligence to final judgment in the said Supreme Court.

Resolved, further, That the claim of the Atchison, Topeka and Santa Fe Railroad Company to have purchased and to own a majority of all the stock of this company, and that in its own right and in connection with the Pueblo and Arkansas Valley Railroad Company it has become and is equitably the owner and entitled to the control of all the affairs, suits, interests and property of this company, is false in fact; that neither of the said companies nor any railroad company or corporation connected with them own any of the stock of this company, or have any control or voice in its management; that the assertion of such claim in the manner proposed is a fraudulent attempt to deprive this company, its stockholders and creditors, of material and valuable rights, interests and property without compensation.

Resolved, That the Secretary send a copy of the foregoing preamble and resolutions to each of the legal officers of the company and counsel engaged in the above entitled causes.

SUPREME COURT OF THE UNITED STATES

Of the October Term, 1878.

THE DENVER AND RIO GRANDE RAILWAY COMPANY, *Appellant*, *vs.* EBENEZER T. ALLING, et al., *Respondents.* — No. 811.

THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY, *Respondent*, *vs.* THE DENVER AND RIO GRANDE RAILWAY COMPANY, *Appellant.* — No. 812.

UNITED STATES OF AMERICA, STATE AND DISTRICT OF COLORADO, EL PASO COUNTY, } ss.

I, Benjamin W. Steele, having first been duly sworn, do depose and say:

I am a resident of Colorado and of lawful age.

I am the holder in my own right of 100 shares in the capital stock of the Denver and Rio Grande Railway Company. I have seen a circular letter issued by William J. Palmer, dated November 11th, 1878. I have not consented to exchange shares in the Denver and Rio Grande Railway Company's stock which I hold for shares in the stock of

the Pueblo and Arkansas Valley Railroad Company as in said letter mentioned. I prefer to retain my Denver and Rio Grande Railway Company stock with all its original rights incidental thereto. I know that there has been, and is now, a bitter and determined contest between the Denver and Rio Grande Railway Company on the one side, and the Pueblo and Arkansas Valley Railroad Company and Cañon City and San Juan Railway Company on the other side, about the right of way through the Grand Cañon of the Arkansas, and believe that ultimately the Denver and Rio Grande Railway Company will prevail and by reason thereof its stock will become very valuable.

I know of the pendency of the above suits on appeal in the Supreme Court of the United States, and was informed and believe that an attempt has been or will be made by the Atchison, Topeka and Santa Fe and Pueblo and Arkansas Valley Railroad companies and the Canon City and San Juan Railway Company, or any one or two of them, or parties in their or either of their interests, claiming to control a bare majority of the stock of the Denver and Rio Grande Railway company, to dismiss said appeals.

I know that the moving parties have a very large interest adverse and hostile to the true interests of the Denver and Rio Grande Railway company and its stockholders; in fact that their adverse and hostile interests are much larger than their alleged interest in the Denver and Rio Grande Railway company's stock; and I charge and believe that the motives to dismiss said appeals are made to benefit such adverse and hostile interests to the irreparable damage and injury of the true interest of the Denver and Rio Grande Railway company of which I am a stockholder; that if said moving parties have acquired control of or interest in a majority of the Denver and Rio Grande Railway company's stock, they are using such majority interest unlawfully to deprive the minority of substantial and valuable rights.

I am informed and believe that the President and Directors of the Denver and Rio Grande Railway company are opposing and contesting the motions and resisting all attempts of the moving parties to interfere with the corporate management of the Denver and Rio Grande Railway company, and the true interests of that company and its stockholders and approve such action and pray that this high court of chancery will protect me in my rights as the holder of shares in the capital stock of the Denver and Rio Grande Railway company and deny said motions to dismiss the appeals aforesaid and proceed to the final adjudication of the rights of said companies respectively involved in these suits.

B. W. STEELE.

Subscribed and sworn to this 8th day of March, 1879, before me,

[NOTARIAL SEAL.] ERNEST P. STEPHENSON,
Notary Public, El Paso Co.

SUPREME COURT OF THE UNITED STATES

Of the October Term, 1878.

THE DENVER AND RIO GRANDE RAILWAY COMPANY, *Appellant,*
vs.
EBENEZER T. ALLING, et al., *Respondents.*
No. 811.

THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY, *Respondent.*
vs.
THE DENVER AND RIO GRANDE RAILWAY COMPANY, *Appellant.*
No. 812.

UNITED STATES OF AMERICA,
STATE AND DISTRICT OF COLORADO,
EL PASO COUNTY, } ss.

I, Henry McAllister, Jr., of Colorado Springs, Colorado, having first been duly sworn, do depose and say:

I am a resident and citizen of Colorado, 42 years of age.

I am, and ever since 1871 have been, a stockholder of the Denver and Rio Grande Railway Company, and now hold 67 shares in the capital stock of said company in my own right.

I always regarded the rights and franchises of said Company, conferred upon it by the act of Congress, approved June 8th, 1872, and the amendatory Act, approved March 3rd, 1877, granting a right of way, two hundred feet wide over, and station grounds on the public lands, as the most

valuable part of the Denver and Rio Grande Railway Company's franchises. This grant was made at a time when Colorado was a Territory, undeveloped and sparsely settled, and its traffic and business very meagre, and when the promoters of nearly every undertaking for the construction of railways in the far west, applied to Congress for subsidies in form of land grants of not less than 12,000 acres per mile, and guarantees, which, to encourage the developement of the country, were readily granted

The rights conferred by Congress upon the Denver and Rio Grande Railway Company, derived their value mainly from the topography of the country through which the Denver and Rio Grande Railway Company had obtained the right to build its railway. It was generally believed that under said Acts of Congress, it had a better right to select the most favorable line through narrow defiles and over passes of the Rocky Mountains than any other railway company, and could thereby secure advantages, which in many instances would enable it to defy competition. I know that ever since the fall of 1877, the Denver and Rio Grande Railway Company made preparations to extend its railway from Cañon City westward, and that ever since the spring of 1878, most vigorous and determined contests have been carried on between said Denver and Rio Grande Railway on the one side and the so called Cañon City and San Juan Railway Company and the Pueblo and Arkansas Valley Railroad Company on the other side, and that the latter were supported therein by the Atchison, Topeka and Santa Fe Railroad Company or parties in its interest. The contests referred to relate to the right of way through the Grand Cañon of the Arkansas, which the Denver and Rio Grande Railway Company claims to be entitled to under said act of Congress of 1872, as amended by the Act of 1877, while the other companies claim a superior right under a later Act of Congress by virtue of an alleged earlier location. I know of these suits, the decision of Judge Hallett therein, of the appeals taken therefrom, and approve of the action of the Directors of said Denver and Rio Grande Railway Company in respect thereto.

I have always believed and still believe that, although Judge Hallett rendered a decision adverse to the Denver and Rio Grande Railway Company, when these suits were pending in the Circuit Court of the United States for the District of Colorado, the said company would be successful on appeal to this court. This litigation and these suits involve questions of the greatest consequence and importance to the Denver and Rio Grande Railway Company and its stockholders and creditors. The Act of Congress, approved June 8th 1872, as amended by the Act approved March 3rd, 1877, contains a proviso to the effect that the right and franchises thereby granted should become null and void on June 8th, 1872, as far as respects the portion of the line which the Denver and Rio Grande Railway Company has the right to build its railway on, unfinished at that time, unless said company should have constructed its railway as far south as Santa Fe, and construct 50 miles additional south of said point in each year thereafter. There are many difficult and narrow passes and defiles along the line which the Denver and Rio Grande Railway Company has the chartered right to construct its railway on, particularly south of Santa Fe, and between that point and El Paso, in Chihuahua, the southern terminus of the Denver and Rio Grande Railway Company's contemplated line, especially on the lower Rio Grande, where a superior right of location is of great consequence as to cost of construction and operation.

The Pueblo and Arkansas Valley Railroad Company is now engaged in constructing a railway from La Junta to the southern boundary line of Colorado in the direction of Santa Fe, and another corporation, created under the laws of New Mexico, is, in the interest of the Pueblo and Arkansas Valley Railroad Company, engaged in extending such railway to Santa Fe with the intent, as I am informed, of ultimately extending it down the lower Rio Grande to a connection with the Southern Pacific Railway, on or along the same general route as that described in the charter of the Denver and Rio Grande Railway Company.

I attended the last annual meeting of the stockholders of said Denver and Rio Grande Railway company, at Colorado Springs, on November 29th, 1878, and voted in favor of conditionally ratifying the form of lease proposed to be made of the constructed road of the last named company to the Atchison, Topeka and Santa Fe Railroad company. I did so with the understanding that as stated therein such lease covered nothing but constructed road. I also received a copy of a circular letter dated November 11th, 1878, with the name of Wm. J. Palmer attached thereto; but I have not nor do I intend to deposit the shares of Denver and Rio Grande company's stock I hold, or to exchange the same in whole or in part for shares in the Pueblo and Arkansas Valley Railroad company's stock as therein proposed I prefer to retain my Denver and Rio Grande Railway company's stock and its incidental rights. I was amazed at being informed a short time ago, that it was claimed by parties in the interest of the Atchison, Topeka and Santa Fe Railroad company, that a settlement of these suits had been made and that the Denver and Rio Grande Railway company had given up and abandoned its rights to its located line through the Grand Cañon of the Arkansas in favor of the Pueblo and Arkansas Valley Railroad company. On inquiry at the office of the Denver and Rio Grande Railway company, I was informed and believe that such claims had been made and that in fact motions had been made in this court and these causes, to dismiss the appeals therein, at the instance of the Atchison, Topeka and Santa Fe and Pueblo and Arkansas Valley Railroad companies and the so-called Cañon City and San Juan Railway company, or some one or more of them, and that the grounds upon which such action was based were that the Atchison, Topeka and Santa Fe Railroad company claimed by lease to control the Pueblo and Arkansas Valley Railroad company, and whatever its claims to a right of way through said Cañon were, and also by the lease, conditionally ratified at the meeting of November 29th, 1878, of the constructed road of the Denver and Rio Grande Railway company to control the latter company's rights and franchises

in and to all extensions of the Denver and Rio Grande Railway company's railway, that the Pueblo and Arkansas Valley Railroad and the so-called Cañon City and San Juan Railway companies claimed to have become consolidated, and that by reason thereof the Atchison, Topeka and Santa Fe Railroad company also controlled the latter company or its line, and that controlling in manner aforesaid all companies claiming any rights in the Cañon it or persons in its interest contemplated to abide by the decision of the Circuit Court and dismiss said appeals. I was likewise informed and believe that by reason of the exchange of stocks proposed by said circular letter of November 11th, 1878, to which I never assented, the Atchison, Topeka and Santa Fe Railroad company or persons in its interest claimed to have obtained the control of 10 shares more than one-half of the entire capital stock of the Denver and Rio Grande Railway company and to control by virtue thereof what said Atchison, Topeka and Santa Fe Railroad company might not control by virtue of the lease.

I was utterly amazed at the propositions and urged the officers of the company to resist the motions, which I believe and charge to be a fraudulent attempt to prevent the adjudication by this court of last resort of the rights of the respective companies under the several acts of congress.

I voted for the conditional ratification of the lease, understanding that the constructed road of the Denver and Rio Grande Railway company only was covered thereby and because I believed that by the lease the construction of a railway, parallel to and competing with such constructed railway between Pueblo and Denver and Cañon City would be prevented in the interest of all concerned, and had I known that more was intended than what the language of the lease appeared to me to cover, I should not have voted in favor of such conditional ratification. If the unfavorable decision of the lower court be allowed to stand by dismissal of these appeals it will be impracticable for the Denver and Rio Grande Railway company to raise sufficient means to complete its railway to the point and within the time provided by said

acts of congress and thus the company and its stockholders be prevented from utilizing its franchises and enhancing the value of its stock. There is no case now pending as far as I have any knowledge or information involving the same questions except a suit against the Pueblo and Arkansas Valley Railroad Company respecting the upper portion of the Arkansas Cañon which would practically be decided (if on these motions the appeals in these cases be dismissed) against the Denver and Rio Grande Railway Company and such questions could not be determined by the highest tribunal within the time limited by said Acts of Congress for the construction of its railway as I am advised and verily believe.

I believe and charge that such motions are instigated, made or countenanced by the Pueblo and Arkansas Valley Railroad Company and the Atchison, Topeka and Santa Fe Railroad Company and the Cañon City and San Juan Railway Company, or persons having large interests in them, to secure for one or the other of said companies the right of way and selection of route along the line which the Denver and Rio Grande Railway Company has the chartered right to build, and to forestall and prevent the Denver and Rio Grande Railway Company from utilizing its franchises for the benefit of all its stockholders, and to render a final determination of the disputes by the court of last resort, impossible before the time limited by the Acts of Congress expires.

I believe and charge that such motions have been instigated and are or will be made and countenanced by the Pueblo and Arkansas Valley Railroad Company and the Atchison, Topeka and Santa Fe Railroad Company and the Cañon City and San Juan Railway Company, or persons in their interest, for purposes of delaying the final adjudication, which I am informed they believe will be adverse to their interests, and by such delay to prevent the Denver and Rio Grande Railway Company from using its franchises under said Acts of Congress within the short term remaining of the period limited by said Acts of Congress. Delay, however will be nearly as fatal to the interests of the Denver and Rio Grande Railway Company and its stockholders as an adverse decision by this

court on the main issues, or the dismissing of these appeals, whereby the adverse decision of the lower court will be allowed to stand.

I also charge and believe that the claims made by the Atchison, Topeka and Santa Fe Railroad Company or persons in its interest that all the rights of the various corporations claiming a right of way through the Canon had been merged in it and such an identification of interests had taken place, that it was now both appellant and appellee in these causes is not made in good faith but is a collusive attempt to prevent a final adjudication by the court of last resort upon the issues on such appeals and thereby deprive persons who have never consented to such an identification of interests but who prefer to rely on their original rights like myself of substantial benefits and by means thereof coerce them to exchange their stocks as proposed in said circular letter of November 11th, 1878, which they have not done and would not do if the decisions on these appeals were favorable, and thus for want of resistance to secure, what if these appeals were decided in favor of the appellants, they never could have accomplished. Had I learned of such claims sooner, or been aware such claims would be made, I should have applied for relief to the courts, but being advised that I could not do so now, either by suit or by intervening in these causes, I submit my rights in the premises as the holder of stock in the Denver and Rio Grande Railway Company, who has never consented to any identification of interests, to this court, and pray that such disposition be made of these motions as will protect me in my original rights, whatever they may be determined to be.

HENRY McALLISTER, JR.

Subscribed and sworn to before me, this 8th day of March, 1879,

ERNEST P. STEPHENSON,
Notary Public, El Paso Co.

[NOTARIAL SEAL.]

SUPREME COURT OF THE UNITED STATES

Of the October Term, 1878.

THE DENVER AND RIO GRANDE RAILWAY COMPANY, *Appellant,*
vs.
EBENEZER T. ALLING, et al., *Respondents.*
No. 811.

THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY, *Respondent.*
vs.
THE DENVER AND RIO GRANDE RAILWAY COMPANY, *Appellant.*
No. 812.

UNITED STATES OF AMERICA,
STATE AND DISTRICT OF COLORADO,
EL PASO COUNTY, } ss.

I, Robert F. Weitbrec, having first been duly sworn, do on oath depose and say:

I am a resident of Colorado and am 31 years of age.

I am and ever since August 1st, 1876, have been Treasurer of the Denver and Rio Grande Railway Company.

The amount expended by said Railway Company in extensions of its line beyond its road which was constructed and in operation on October 4th, 1878, is as near as can be ascertained at the present time, about $250,000. The company is still engaged in building its extension in the Upper Arkansas Cañon and the sum above named is on account thereof, neces-

sarily based, in some particulars, on estimates which are however within rather than outside of the actual cost.

The interference by the so-called Cañon City and San Juan Railway Company and the Pueblo and Arkansas Valley Railroad Company with the Denver and Rio Grande Railway Company's selected line has largely increased the expenses, and simultaneous construction by several hostile companies on practically the same line along the Arkansas River, has greatly impaired the efficiency of the Denver and Rio Grande Railway Company's forces and increased the cost, and the actual value of the work done does not equal the amount expended thereon.

The legal expenses occasioned by the above suits amount to not less than $17,000; the engineering expenses were exceptionally high, as the company was compelled by Judge Hallett's decision in these causes to run several lines through difficult territory; a large force of men had to be maintained by the Denver and Rio Grande Railway Company, in order to keep possession of the disputed ground, until the Court enjoined the said Company from continuing such possession. A large amount of tools and material was originally provided, when it was hoped that the Denver and Rio Grande Railway Company would be able to build on its located line, which, after Judge Hallett's decision could not be used to advantage.

The construction of the road on the first 20 miles west of Cañon City was suspended because the line which the Denver and Rio Grande Railway Company by the adverse decision of Judge Hallett, was forced to occupy or stop work, was very much less practicable and more expensive, largely increasing the cost thereof, with no work done available for use on the line claimed by the Denver and Rio Grande Railway Company to represent it, all of which items were properly chargeable on account of new extensions and not against constructed road.

I went recently on a tour of inspection through the Arkansas Valley, where both the Denver and Rio Grande Railway Company and the Pueblo and Arkansas Valley Railroad Company were simultaneously engaged in construction; with the assistance of the Chief Engineer of our company, I made a rough estimate of the actual value of the work done by the Denver and Rio Grande Railway Company and its contractors, and I am convinced that on an appraisement such work would be valued at very much less than its cost.

I have been in the railroad business for 9 years, and since 1876 have exercised a general supervision over construction of new road in the absence of the President of the Denver and Rio Grande Railway Company, and am well acquainted with its details.

R. F. WEITBREC.

Subscribed and sworn to before me this 10th day of March, A. D. 1879.

ERNEST P. STEPHENSON,
Notary Public, El Paso Co.

[NOTARIAL SEAL.]

SUPREME COURT OF THE UNITED STATES

Of the October Term, 1878.

THE DENVER AND RIO GRANDE RAILWAY COMPANY,
vs. *Appellant,*
EBENEZER T. ALLING, et al.,
Respondents.
No. 811.

THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY,
vs. *Respondent.*
THE DENVER AND RIO GRANDE RAILWAY COMPANY,
Appellant.
No. 812.

UNITED STATES OF AMERICA,
STATE AND DISTRICT OF COLORADO, } ss.
EL PASO COUNTY.

I, Theodore F. H. Meyer, having first been duly sworn, on oath do depose and say:

I am an attorney and counsellor at law and a member of the New York bar,

In October, 1878, I was engaged by Mr. Wm. J. Palmer, President of the Denver and Rio Grande Railway Company, to render legal assistance in the negotiations which were at that time carried on by him in Boston, with representatives of the Atchison, Topeka and Santa Fe Railroad Company and the Pueblo and Arkansas Valley Railroad Company.

I arrived at Boston on October 9th, 1878. In the afternoon of that day the counsel of the respective parties to the

negotiations met at the office of Mr. T. K. Lothrop, No. 2, Pemberton Square, for the purpose of discussing the form of lease which was to be prepared; there were present Mr. Shattuck of counsel for the Atchison, Topeka and Santa Fe Railroad Company, and Gen'l Palmer and his counsel, Mr. Lothrop and myself. Mr. Palmer, then and there, made a statement to all of us of what in his opinion should be provided for and against, and after some general discussion, Mr. Shattuck proceeded to dictate a form of lease; I reduced it to writing; in dictating the description of the railroad to be leased he employed the word located as well as constructed. I underscored the word "located," and made an interrogatory sign in the margin. Mr. Shattuck asked me what I did that for; I answered: "I do not like the word—it has a wide meaning;" and he proceeded. After he had finished I took the papers into my custody. On the morning of the 10th Mr. Lothrop and myself carefully examined the form of lease Mr. Shattuck had dictated and we concluded that if that form were adopted it would cover all the railway which the Denver and Rio Grande Railway Company had the right to build, or at least all it had located, including the line through the Grand Cañon of the Arkansas. Mr. Lothrop suggested that Mr. Palmer should associate with us Mr. Wm. G. Russell, a gentleman of very high standing and reputation. Mr. Palmer consented and Mr. Russell became associated with Mr. Lothrop and myself. Mr. Palmer instructed us to carefully guard that nothing was covered by the lease but constructed road, and that all other rights and franchises were reserved, and expressed his determination to insist on that point, as the reservation of the rights to construct extensions, including the right through the Cañon, furnished the only means to provide for the excess of debt which existed over $22,664 per mile of constructed road. After a day or two, during which I had prepared a form of lease which incorporated what Mr. Palmer desired and had determined to insist upon, another meeting

took place between the counsel for the respective parties. The point was distinctly raised and discussed that nothing but constructed road and franchises and property connected therewith was to be included in the lease, and finally conceded by Mr. Shattuck, who took the form of lease I had prepared, to have it printed, Numerous interviews were thereafter had between the counsel, at which Mr. Shattuck or his law partner, Mr. Holmes, attended, and many alterations and amendments made and this form amended, revised and adopted.

I was present at different interviews between Mr. Palmer and Mr. Thomas Nickerson, at one of which the value of the rights of the Denver and Rio Grande Railway Company in the Arkansas Cañon was alluded to, and I heard Mr. Thomas Nickerson say that the Denver and Rio Grande Railway Company had no right in the Cañon of any value.

I drafted the agreement between Mr. Palmer and Mr. Speare. I had a lengthy interview respecting it with Mr. Holmes, the law partner of Mr. Shattuck, at my rooms at the Parker House, Boston, on Friday afternoon, October 18th; on the 19th I was requested to go to the office of the Atchison, Topeka and Santa Fe Railroad Company to meet Mr. Nickerson and Mr. Palmer. I found Mr. Alden Speare there; Messrs. Nickerson and Speare had read over my draft and had made numerous alterations and amendments; Mr. Palmer requested me to examine the alterations; I adopted some and rejected others; Messrs. Nickerson and Speare had struck out the important parts of a provision relating to the reservation of all assets of the company outside of the to be demised property, for the payment of such debts of said company in excess of $22,664 per mile of constructed road, as Mr. Palmer should direct and in the manner he should direct and requiring the trustee with whom Denver and Rio Grande Railway Company's stock was to be deposited by Mr. Palmer to aid, assist with his vote or otherwise in carrying the provision into effect; I objected to that being struck out and

spoke first to Mr. Speare—he said: "You must speak to Mr. Nickerson;" when I had secured the latter's attention, I told him what I wanted; Mr. Nickerson said, "I don't understand what you want that for, I don't understand the meaning." I told him, Mr. Speare standing near by, that debts in excess of $22,664 per mile existed, not provided for by the lease, and that Palmer was expected to provide for these, that all property of the company, other than the leased part, must therefore be reserved not only in the lease but in this agreement also, as otherwise Palmer would be unable to comply with the agreement and that the provisions to carry it into effect must be retained, so as to make Mr. Palmer safe in acting on it; after some hesitation and making some verbal alterations, the provisions were with Mr. Nickerson's assent replaced; later in the evening the papers having been copied were compared by me with the drafts, read by Mr. Holmes, Mr. Nickerson and Mr. Speare and signed; the papers so signed were the form of lease; an agreement depositing same in escrow, and the agreement between Mr. Speare and Mr. Palmer I signed as witness. When the lease was placed in escrow, the original of the agreement between Palmer and Speare was also placed in Mr. Schlesinger's hands in escrow; these papers were all parts of one plan and it was intended that if for any reason the Atchison, Topeka and Santa Fe Railroad Company, or Denver and Rio Grande Railway Company should fail on the lease, or the lease not become operative, the Palmer–Speare agreement should have no force, and Mr. Speare not become entitled to the 42,510 shares of Denver and Rio Grande Railway Company's stock nor Mr. Palmer be entitled to any stock of the Pueblo and Arkansas Valley Railroad Company, there was to be no interchange without a lease, no lease without an interchange. I heard Mr. Palmer say to Mr. Speare, "We will put this paper also in escrow with the lease," and Mr. Speare assenting, the said agreement was placed in Mr. Schlesinger's hands in escrow.

I know from an uninterrupted connection with the affairs as one of the counsel of Mr. Palmer, that neither of the papers placed thus in escrow have been delivered by Mr. Schlesinger at this time.

THEODORE F. H. MEYER.

Subscribed and sworn to before me this 10th day of March, A. D. 1879.

ERNEST P. STEPHENSON,
Notary Public, El Paso Co.

[NOTARIAL SEAL.]

SUPREME COURT OF THE UNITED STATES

Of the October Term, 1878.

THE DENVER AND RIO GRANDE RAILWAY COMPANY, *Appellant,*
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No. 812.

UNITED STATES OF AMERICA,
STATE AND DISTRICT OF COLORADO,
EL PASO COUNTY, } ss.

I, William J. Palmer, being duly sworn, say on oath.

I have read the affidavit of T. Jefferson Coolidge made herein January 16th, 1879.

It is true that under and in execution of the agreement between myself and Mr. Alden Speare, of Boston, copy of which is annexed to my other affidavit herein, I deposited with said Coolidge, who received, 42,510 shares of the stock of the Denver and Rio Grande Railway Company in trust as in said agreement provided, among the trusts on which the same were so deposited is that said Coolidge should at all times and whenever requested, aid and assist with his vote on such stock or otherwise howsoever, in carrying out a provision of said agreement whereby whatever assets the Denver and Rio Grande Railway Company might have outside of certain leased or to be leased railroad and premises, at the time of surrendering possession thereof to the Atchison, Topeka and Santa Fe Railroad Company, or accruing to the Denver and Rio Grande Railway Company afterwards on account of the administration of its business before such date, should be well and truly applied to the payment of debts of said Denver and Rio Grande Railway Company in excess of $22,664 per mile of constructed road, as I might direct, or in such manner as I might direct.

The property involved on these appeals forms part of the assets of the Denver and Rio Grande Railway Company outside of the railroad and premises described in the form of lease agreed on between the Denver and Rio Grande Railway Company and the Atchison, Topeka and Santa Fe Railroad Company on October 19th, 1878. I learned in January, 1879, that said Coolidge had made an affidavit herein, and thereupon I addressed and sent a letter to him, which I am informed and believe he has received as follows:

31 January, 1879.

T. Jefferson Coolidge, Esq.,

Boston.

DEAR SIR:—

It is provided in the agreement between Alden Speare, Esq., and myself, as stated in enclosed extract, marked "A."

I am not yet prepared to say in what particular manner I desire you, as trustee under the agreement, to "aid and assist" in carrying out the provision referred to in regard to the application of all assets of this company, except the constructed railway; but meanwhile, as efforts are being made by the Pueblo and Arkansas Valley Railroad Company and the Atchison, Topeka and Santa Fe Railroad Company, to defeat the objects of said provision, I write to call your attention to it, and beg leave to enclose the opinion of our counsel (marked "B,") in regard to the matter.

As soon as we can ascertain definitely the mode in which you can so aid me, I will take the liberty of calling upon and claiming the agreed assistance.

I am

Respectfully Yours,

WM. J. PALMER.

I charge that said Coolidge has made said affidavit of January 16th, 1879, in violation of his trust and by enumerating but one of the trust conditions therein, sought to suppress the truth.

I have since been informed by Mr. Coolidge, and believe, that he has delivered the certificate representing the said 42,510 shares deposited with him to Alden Speare.

I have also since February 1st, 1879, learned of the contents of Coolidge's affidavit, and have thereupon addressed to him and Mr. Speare, separately, a letter, of which the following is a copy:

28 February, 1879.

T. Jefferson Coolidge, Esq.,
Alden Speare, Esq.,
Boston, Mass.

GENTLEMEN:—

Being advised that the 42,510 shares of the Denver and Rio Grande Railway Company's stock deposited by me under the provisions of an agreement dated October 19, 1878, made

by me individually with Mr. Alden Speare, have been transferred and stand now on the books of the Denver and Rio Grande Company in the name of T. Jefferson Coolidge, trustee, and being also informed by Mr. Coolidge that the certificate representing said shares has been delivered by him to Mr. Alden Speare notwithstanding my protest, and it thus appearing that the legal title to said shares is in Mr. Coolidge while the manual possession of the certificate evidencing the interest is in Mr. Speare, I without waiving any of my rights arising under the said agreement from the delivery by Mr. Coolidge of said certificate against my protest I beg to call the attention of both of you to the terms of that agreement relating to such stock, and especially to that provision which is as follows, to-wit:

"It is further agreed that whatever assets the said Denver "and Rio Grande Railway Company may have outside of said "demised railroad and premises at the time of surrendering "possession thereof to the Atchison, Topeka and Santa Fe "Railroad Company or accruing to it afterwards on account "of the administration of its business before such date, shall "be well and truly applied towards the payment of such debts "of said company (in excess of the sum of twenty-two thou- "sand six hundred and sixty-four dollars per mile) as the party "of the first part may direct, and in such manner as he "may direct, and that the trustee hereunder, or the "person to whom the Trustee may hereafter transfer and "assign the stock, which shall be deposited with him by said "party of the first part, shall at all times and whenever "requested aid and assist with his or their vote on such stock "or otherwise howsoever in carrying out this provision."

You will further observe that by the terms of the lease referred to, none of the property rights or franchises of the Denver and Rio Grande Railway Company are proposed to be leased except 337 miles of constructed railroad, and the property rights and franchises appurtenant thereto, and there-

fore that the right of way over the public lands which said company claims for its railway from Cañon City westward up the Arkansas River, through the Grand Cañon of the Arkansas is likewise part of the property (called assets) reserved to said company to be protected by said stock in manner in said agreement provided as hereinbefore mentioned.

You are doubtless aware that the exclusive right claimed by the said company to occupy its right of way over and upon the public domain in said Cañon for the purpose of building thereon its line of railway has been contested in the courts and that two cases are now pending on appeal in the Supreme Court of the United States involving the right of said company to occupy and possess itself of its said right of way, and also of the work and materials by it expended in the process of, on said right of way, constructing a line of railway. One of which cases is entitled The Denver and Rio Grande Railway Company, Appellant, against Ebenezer T. Alling and others, Respondents, and is number 811 on the calendar, and the other of which is entitled the Cañon City and San Juan Railway Company, Respondent, against the Denver and Rio Grande Railway Company, Appellant, and is numbered 812 on said calendar, and that said two causes were submitted to said Court on printed arguments by the respective parties on the 10th day of January, for final adjudication upon the merits, and that since that time a motion has been filed in said causes before said Court to substitute The Atchison, Topeka and Santa Fe Railroad Company as a party in the place of said Denver and Rio Grande Railway Company, and other purposes, among them to dismiss said appeals.

If such motion should be granted, you will perceive that its effect would be to deprive the Denver and Rio Grande Railway Company of valuable assets, to wit: its right of way over the public domain up the Arkansas Valley through the Grand Cañon thereof, and the work and materials by it ex-

pended thereon as aforesaid, without any consideration, and thus render it impossible "to apply the same to the payment "of such debts of said company" as I shall direct, to the prejudice of its creditors and stockholders.

The shares of capital stock now standing in the name of Mr. Coolidge are expressly pledged to prevent that catastrophe, and for the purpose of defending and preserving those assets to the benefit of the company, its creditors and stockholders, I insist, that my right to and interest in said stock is as absolute and perfect as is yours to its use for certain other purposes, as it was only upon that basis that it was ever transferred to Mr. Coolidge.

I, therefore, hereby respectfully call upon you, Mr. Coolidge, as the holder of the legal title to said shares, and you, Mr. Speare, as the holder of said certificate of stock, to aid and assist me in defeating said motion, which is set down for hearing by said court on the 17th day of March proximo.

I, therefore, respectfully request you severally to make affidavits of the fact that you concur with me in opposing the said motion or the granting thereof, by the court, and to that end I enclose affidavits, one for each of you and request you to subscribe and verify the same respectively, and to return the same to me that I may file it in the said court and use it on the hearing of said motion.

As the time for the preparation of our papers and briefs is limited, I beg to ask the favor of an early compliance with this request by both of you.

I am

Yours Respectfully,

(Signed,) WM. J. PALMER,

Pres't.

Hereto annexed, marked "K" and "L," are copies of the affidavits respectively sent with a copy of said letter to each, Mr. Coolidge and Mr. Speare.

WM. J. PALMER.

Subscribed and sworn to before me, this 10th day of March, 1879.

ERNEST P. STEPHENSON,
Notary Public, El Paso Co.

[NOTARIAL SEAL.]

K.

SUPREME COURT OF THE UNITED STATES

THE DENVER AND RIO GRANDE RAILWAY COMPANY, *Appellant,*
vs.
EBENEZER T. ALLING, et al., *Respondents.*
No. 811.

THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY, *Respondent.*
vs.
THE DENVER AND RIO GRANDE RAILWAY COMPANY, *Appellant.*
No. 812.

UNITED STATES OF AMERICA, }
DISTRICT OF MASSACHUSETTS, } ss.

T. Jefferson Coolidge, being duly sworn doth depose and say he received as trustee under a certain agreement dated October 19th, 1878, by and between Wm. J. Palmer and Alden Speare, from said Palmer 42,510 shares in the capital stock of

the Denver and Rio Grande Railway company represented by certificate No. 1,729. That on or about the 16th day of January, 1879, deponent made an affidavit in the causes, wherein this affidavit is entitled, that since that time deponent has received a letter from said Wm. J. Palmer, of which the annexed is a copy; but that prior to such receipt deponent had delivered the said certificate to said Alden Speare, and deponent desires to withdraw the affidavit heretofore made by him on January 16th, 1879.

DISTRICT OF MASSACHUSETTS, }
February A. D. 1879. }

Then personally appeared the said T. Jefferson Coolidge and made oath to the truth of the foregoing affidavit by him subscribed, before me,

Commissioner of the United States Circuit Court for the District of Massachusetts.

L.

SUPREME COURT OF THE UNITED STATES

THE DENVER AND RIO GRANDE RAILWAY COMPANY, *Appellant*, *vs.* EBENEZER T. ALLING, et al., *Respondents.* — No. 811.

THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY, *Respondent*, *vs.* THE DENVER AND RIO GRANDE RAILWAY COMPANY, *Appellant.* — No. 812.

UNITED STATES OF AMERICA, DISTRICT OF MASSACHUSETTS. } ss.

Alden Speare being duly sworn doth depose and say that he resides at Boston, in the State of Massachusetts, and is one of the parties to a certain agreement bearing date the 19th day of October, A. D. 1878, made by Wm. J. Palmer as party of the first part, and this deponent as party of the second part.

That under said agreement the said Wm. J. Palmer deposited with T. Jefferson Coolidge as trustee, forty-two thousand five hundred and ten shares of the capital stock of the Denver and Rio Grande Railway company, and the deponent deposited eight thousand and five hundred and two shares of the capital stock of the Pueblo and Arkansas Valley Railroad company. That heretofore and on the 16th day of January,

1879, the said T. Jefferson Coolidge as such trustee, as deponent is informed and believes, made an affidavit in the actions wherein this affidavit is entitled, giving his consent that a motion to cancel the stipulation for the submission of said causes to said court, and other matters, among them substituting the Atchison, Topeka and Santa Fe Railroad company as a party in the place of the said appellant, and that said appeals be dismissed.

Deponent further says that since the time of making said affidavit, and on or about the day of February, 1879, the said T. Jefferson Coolidge delivered the certificate representing said shares of stock to this deponent, and this deponent as the holder thereof, has been and is requested by said William J. Palmer to aid and assist in opposing the making of said motion, or the granting thereof by said Court. And therefore this deponent as the holder of said certificate of stock as aforesaid, does hereby express and make known his dissent from making said motion before said Court and that he is opposed to the granting thereof by said Court.

DISTRICT OF MASSACHUSETTS, }
February A. D. 1879. }

Then personally appeared the said Alden Speare and made oath to the truth of the foregoing affidavit by him subscribed before me,

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Commissioner of the United States Circuit Court for the District of Massachusetts.

SUPREME COURT OF THE UNITED STATES

Of the October Term, 1878.

THE DENVER AND RIO GRANDE RAILWAY COMPANY,
vs. *Appellant*,
EBENEZER T. ALLING, et al.,
Respondents.
} No. 811.

THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY,
vs. *Respondent.*
THE DENVER AND RIO GRANDE RAILWAY COMPANY,
Appellant.
} No. 812.

UNITED STATES OF AMERICA,
STATE AND DISTRICT OF COLORADO,
EL PASO COUNTY,
} ss.

I, Willliam J. Palmer, having first been duly sworn, do on oath depose and say:

I have read the paper which purports to have been subscribed and sworn to by Thomas Nickerson on January 16th, 1879.

1. I am informed, and verily believe, that the so-called Cañon City and San Juan Railway company was never lawfully, or otherwise, consolidated with the Pueblo and Arkansas Valley Railroad company.

2. I am informed, and verily believe, that the Atchison, Topeka and Santa Fe Railroad company has no control over the Pueblo and Arkansas Valley Railroad company; that true

it is said Atchison, Topeka and Santa Fe Railroad company pretends to have leased the constructed railroad of the said Pueblo and Arkansas Valley Railroad company between Sargent and Pueblo. Separate organizations of the two companies are maintained.

3. It is untrue, that since the filing of the printed arguments upon these appeals, contracts and agreements have been made between the Denver and Rio Grande Railway company and the Pueblo and Arkansas Valley Railroad company and the Atchison, Topeka and Santa Fe Railroad company, whereby the last named company has leased the Denver and Rio Grande Railway company's railroad and property for thirty years It is also untrue that the Denver and Rio Grande Grande Railway company has delivered possession of its railroad and property to the Atchison, Topeka and and Santa Fe railroad company. It is untrue that the Denver and Rio Grande Railway Company contracted to deliver and did deliver to a trustee for the benefit of the Atchison, Topeka and Santa Fe Railroad company a majority of all the shares of the stock of the Denver and Rio Grande Railway company. It is untrue that the Denver and Rio Grande Railway company has contracted for the purchase by or on behalf of the Atchison, Topeka and Santa Fe Railroad company of the remainder of the stock of said Denver and Rio Grande Railway company. It is untrue, that it was ever agreed that the entire control and disposition of all the affairs and interests of the Denver and Rio Grande Railway company should be vested in the Atchison, Topeka and Santa Fe Railroad company.

I further say:

4. The Denver and Rio Grande Railway company has constructed 337 miles of railroad; and has other rights and franchises to build extensions of the road so constructed very valuable in their character and beg leave to refer to the record in this case in corroboration thereof.

5. A form of lease has been agreed upon, of the constructed road, only between the Denver and Rio Grande Railway company and the Atchison, Topeka and Santa Fe Railroad company; all other rights and franchises being expressly reserved. Said lease is still held in escrow and whether the same ever will become effective largely depends on the action of the said Atchison, Topeka and Santa Fe Railroad company.

6. It is true, that I, reserving all other rights, delivered possession of the constructed road of the Denver and Rio Grande Railway company on midnight, December 13th, 1878, to the Atchison, Topeka and Santa Fe Railroad company with the understanding that such possession was entirely dependent on the said lease becoming effective, and that in the meantime, the property so delivered was to be operated on the terms and conditions of said lease, which have since been violated by said Atchison, Topeka and Santa Fe Railway company in 14 different ways.

7. I, individually, made a contract with one Alden Speare on October 19th, 1878, whereunder I have deposited 42,510 shares of the Denver and Rio Grande Railway Company's stock with a trustee, subject to be returned to me on certain contingencies. I was under no obligations to do so and am under no obligation to deposit more stock, nor is any one else to my knowledge.

8. The form of lease and my personal agreement with Mr. Speare were agreed on and made on October 19th, 1878. On November 6th 1878, a motion for an injunction was argued before Mr. Justice Hallett, at Denver, Colorado, in a suit pending in the Circuit Court of the United States for the District of Colorado, forming part of this litigation.

On November 28th 1878, the printed briefs of the appellants herein were served on the attorney and counsel for the appellee herein.

Since December 1st, 1878, the case pending in the Circuit Court of the United States for the District of Colorado, has been tried, and motions have been made by the attorneys for the Pueblo and Arkansas Valley Railroad company, defendant therein, to file a supplemental answer.

On December 13th, 1878, conditional possession of constructed road of the Denver and Rio Grande Railway company was given to the Atchison, Topeka and Santa Fe Railroad company.

On December 28th, the appellees herein served their printed briefs on these appeals upon appellant's attorney. On January 10th, 1879, the cases were submitted in this Court on stipulations.

WM. J. PALMER.

Subscribed and sworn
to before me, this 10th
day of March, 1879,

ERNEST P. STEPHENSON,
Notary Public, El Paso Co.

[NOTARIAL SEAL.]

SUPREME COURT OF THE UNITED STATES

Of the October Term, 1878.

THE DENVER AND RIO GRANDE RAILWAY COMPANY,
Appellant,
vs.
EBENEZER T. ALLING, et al.,
Respondents.
No. 811.

THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY,
Respondent.
vs.
THE DENVER AND RIO GRANDE RAILWAY COMPANY,
Appellant.
No. 812.

UNITED STATES OF AMERICA,
STATE AND DISTRICT OF COLORADO,
EL PASO COUNTY,
ss.

I, William J. Palmer, having first been duly sworn, do depose and say:

On or about the 4th day of December, 1878, I addressed to Mr. Thomas Nickerson, President of the Atchison, Topeka and Santa Fe Railroad Company, a letter of which the following is a copy:

December 4, 1878.

Thos. Nickerson, Esq., Prest. Atchison, Topeka & Santa Fe R. R. Co., Boston, Mass.

DEAR SIR:—

I enclose copy of circular issued to the Denver & Rio Grande stock holders and invite you to deposit your stock in accordance therewith if such course meets your approval.

I should also be glad if you would recommend any of your friends who may hold this stock to do the same.

Yours respectfully,

WM. J. PALMER.

Per H.

And received in answer thereto a letter of which the following is a copy:

BOSTON, DEC. 12TH, 1878.

Gen'l W. J. Palmer,
Pres't.

DEAR SIR:—

This Company have never held any of your stock, except a small amount taken for transportation which was sold long since, and regret the sale now when too late.

Excuse my delay in answering yours of the 4th, as I am crowded with work. I should however, have responded before if I had had the stock.

Yours Respectfully,
THOS. NICKERSON, Pres't.

Subscribed and sworn to before me this 10th day of March, A. D. 1879.

WM. J. PALMER.

ERNEST P. STEPHENSON,
Notary Public, El Paso Co.
[NOTARIAL SEAL.]

I, William Wagner, having first been duly sworn say:

I am Secretary of the Denver and Rio Grande Railway Company and custodian of the stock ledger and transfer books of said company; and know that there stand no shares of the Denver and Rio Grande Railway Company's capital stock on the books of said company, in the name of the Atchison, Topeka and Santa Fe Railroad Company, or in the name of any other person or party, as trustee for said last named company.

WM. WAGNER.

Subscribed and sworn to before me this 10th day of March, A. D. 1879.

ERNEST P. STEPHENSON,
Notary Public, El Paso Co.
[NOTARIAL SEAL.]

SUPREME COURT OF THE UNITED STATES

Of the October Term, 1878.

THE DENVER AND RIO GRANDE RAILWAY COMPANY, *Appellant,* vs. EBENEZER T. ALLING, et al., *Respondents.*	No. 811.
THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY, *Respondent.* vs. THE DENVER AND RIO GRANDE RAILWAY COMPANY, *Appellant.*	No. 812.

UNITED STATES OF AMERICA,
STATE AND DISTRICT OF COLORADO, } ss.
EL PASO COUNTY,

William J. Palmer, having first been duly sworn, doth on oath depose and say:

Ever since the organization of the Denver and Rio Grande Railway Company on the 27th day of October, 1870, I have been, and am now, the President and Executive Director of the said Railway Company. Prior to April 19th, 1878, the Denver and Rio Grande Railway Company had completed and was operating its Railway of narrow gauge, to wit, 3 feet, by the route mentioned in its charter, from Denver southward to a point on the Arkansas River at Pueblo, and thence up the valley of the Arkansas to a point at or near Cañon City. On said 19th day of April, said Railway Company, with the bona

fide intent of continuing the construction of its Railway from Cañon City westward by the route described in its charter as follows: "Up the Valley of the Arkansas River, through the "big Cañon of the same to a point at or near the mouth of the "South Arkansas River," and so forth to points beyond, took possession of the said Grand Cañon with a construction force and relying on the acts of Congress hereinafter mentioned commenced the construction of its railway therein, having prior thereto and as early as 1871 made a survey in said Cañon, located a line through part thereof and done some grading thereon; the said Cañon so taken possession of is at places not wider than forty-five feet, enclosed by high and precipitous rocks, and in the narrow portion of said Cañon but one railroad can be constructed and operated with safety, as practical experience has shown that it is even necessary in constructing one road therein to cross from one side to the other at places to avoid cutting the walls of the Cañon composed of a shelving granite, lest the rock should come down in such quantities as to fill up the narrow bed of the river, while in the wider portions the topography of the country renders the choice of location of great value by reason of a difference in the cost of construction of a railway therein and the expenses of maintaining and operating the same.

Almost immediately after said Denver and Rio Grande Railway Company had taken such possession, a number of individuals, styling themselves the Cañon City and San Juan Railway Company, likewise attempted to take possession of said Cañon, suits were commenced and such proceedings thereafter had that on the twenty-fourth day of August, 1878, the Circuit Court of the United States for the District of Colorado, made its decrees therein enjoining the said Denver and Rio Grande Railway Company from interfering with the said so-called Cañon City and San Juan Railway Company; from which decrees the said Denver and Rio Grande Railway Company forthwith appealed to the Supreme Court of the United States.

The said Denver and Rio Grande Railway Company in such suits and on such appeals (which are the suits now pending in this Court and wherein this affidavit is entitled) claimed and still claims to be entitled to the occupation, enjoyment and possession of the public lands in said Cañon to the extent of its right of way, and of 20 acres at any one station, not more than one station in every ten miles, for depots, shops and other buildings for railroad purposes, and for yard room and side tracks, under and by virtue of certain acts of Congress, one of which being entitled "An act granting the right of way through "the Public Lands to the Denver and Rio Grande Railway "Company," approved June 8th, 1872, after the enacting clause contains the following language: "That the right of way over the "public domain, one hundred feet in width on each side of the "track, together with such public lands adjacent thereto as "may be needed for depots, shops, and other buildings for "railroad purposes and for yard room, and side tracks, not ex- "ceeding 20 acres at any one station, and not more than one "station in every ten miles; and the right to take from the "public lands adjacent thereto, stone, timber, earth, water, and "other material required for the construction and repair of its "railway and telegraph line, be, and the same are hereby granted "and confirmed to the Denver and Rio Grande Railway Com- "pany, a corporation created under the incorporation laws of "the Territory of Colorado, its successors and assigns;" and contains no restrictions, reservations or limitations upon the grant, except that, first, the same rights, powers and privileges conferred upon the Union Pacific Railroad Company by section 3 of an act approved July 2d, 1864, were conferred upon the above named Railway Company, its successors and assigns, which section 3 so referred to and made applicable to the Denver and Rio Grande Railway Company, provides for the condemnation of and payment for a right of way on said Company's entering upon private property, and second, in case the said Company should fail to complete its railway to a point on the Rio Grande as far south as Santa Fe within five

years of the passing of said act, and fifty miles additional south of said point in each year thereafter, the rights and privileges by said act granted should be rendered null and void as far as respects the unfinished portion of said road; and the other of which Acts of Congress above referred to being entitled, "An "act to amend an act entitled 'an act, granting the right of "way through the public lands to the Denver and Rio Grande "Railway Company,' approved June 8th, 1872," approved March 3d, 1877, enlarged the time wherein said Railway Company was required to complete its road as far south as Santa Fe, by the change of words in the original act, substituting for the word "five" there used the word "ten," and so as to make the second proviso in the said act approved June 8th, 1872, read as follows:

"Provided, that said Company shall complete its railway "as far south as Santa Fe within ten years of this act, and "shall complete fifty miles additional south of said point in "each year thereafter; and in default thereof the rights and "privileges herein granted shall be rendered null and void as "far as respects the unfinished portions of said road."

The said so-called Cañon City and San Juan Railway Company, and the individuals styling themselves so, in said suits claimed and as deponent is informed and believes still claim the right of way through said Cañon for a distance of twenty miles westward from Cañon City, under and by virtue of an act of Congress entitled "An act granting to railroads the "right of way through the public lands of the United States," approved March 3d, 1875, and certain proceedings had thereunder ex parte, of which the Denver and Rio Grande Railway Company had no notice, knowledge or information, by which ex parte proceedings they insisted on having secured under a later grant a superior right by virtue of an earlier location, notwithstanding that in fact the Denver and Rio Grande Railway Company had as early as 1871 located its line over part of the same ground.

In May or June, 1878, the Pueblo and Arkansas Valley Railroad Company making similar claims and pretentions as the so-called Cañon City and San Juan Railway Company under the same act of Congress, approved March 3d, 1875, respecting the upper part of said Cañon, westward of a point twenty miles west of Cañon City, took possession of parts of such upper Cañon, whereupon the Denver and Rio Grande Railway Company instituted a suit in equity against said Company in the Circuit Court of the United States for the District of Colorado, and moved the Court for an injunction restraining said Pueblo and Arkansas Valley Railroad Company from interfering with its right of selection of route; that such injunction was not granted as hereinafter stated, and said case is still pending and undetermined.

The grant aforesaid of the right of way by Congress in 1872 was always and is now by my Company, its creditors and stockholders regarded as very valuable, and persons who invested their capital in the bonds and stock of the Denver and Rio Grande Railway Company and gave it credit, were largely influenced to make such investment and give such credit by reason of the supposed value of such grant, under which, it was generally believed the Denver and Rio Grande Railway Company, had the choice of location or superior right to appropriate public lands along its chartered line, to the extent in such grant provided for the purposes of its railway as against all other railroad companies or similar undertakings, and by reason of such superior right and the topography of the country was enabled to construct its railway in the defiles and across the passes of the Rocky Mountain ranges, along the line it had the chartered right to build, on easier grades at less expense and to maintain and operate the same more cheaply, and therefore more successfully to conduct its business than any rival line.

At the present time the said Denver and Rio Grande Railway Company has a large floating debt in excess of its

debt secured by mortgages, as hereinafter mentioned, and of $22,664 per mile of constructed road, and its capital stock actually issued amounts to $8,500,000, divided into 85,000 shares of $100 each, of which 85,000 shares,

42,510 Shares are standing in the name of Mr. T. Jefferson Coolidge, Trustee, which are the shares deposited by me with said Coolidge in trust, under the provisions of a certain agreement, as hereinafter mentioned; and as near as I can ascertain not more than

29,217¼ Shares are held by me as trustee, having been deposited by numerous persons and parties with me in trust upon the terms and conditions of a certain circular letter issued by me, dated November 11th, 1878, as hereinafter mentioned; and as near as can be ascertained not less than

13,272¾ Shares are held by over 200 different persons and parties, partnership firms and corporate bodies, who have never given their consent to the plan proposed by my said circular letter.

In August or September, 1878, the Pueblo and Arkansas Valley Railroad Company or other corporation or persons in its interest threatened to construct a railway parallel to that portion of the constructed road of the Denver and Rio Grande Railway Company extending from Denver southward to Pueblo, and from Pueblo westward to Cañon City. The said Pueblo and Arkansas Valley Railroad Company being then already engaged in the construction of a railway from La Junta to Trinidad, and thence into New Mexico, to compete with that portion of the then constructed railroad of the Denver and Rio Grande Railway Company south of Pueblo for the New Mexican traffic and the El Moro coal trade, which then and until recently formed an important factor in the Denver and Rio Grande Railway Company's business.

The Denver and Rio Grande Railway Company having constructed by far the greater part of its railroad then completed and in operation, at times when labor and material commanded high prices generally and especially in that part of the country where the road is situate and money could only be obtained at heavy discounts for an undertaking of that character, in a new and undeveloped country, had at the time of such threat a large bonded indebtedness, averaging over $22,000 per mile, secured by mortgage liens on different portions of its chartered line; one mortgage covering the portion from Denver southward via Pueblo and Cucharas to El Moro, the El Moro collieries and to Alamosa, and another separate mortgage covering that portion between Cañon City and Pueblo and the Cañon coal mines, and the said Railway Company was then for the first time since its organization earning sufficient to pay interest on its bonded debts.

The actual construction of a competing line south of Pueblo for the New Mexican traffic and the El Moro coal business, and the threatened construction of a competing line from Pueblo to Cañon City and from Pueblo to Denver along the eastern base of the mountain range, in an open country and in close proximity to the Denver and Rio Grande Railway Company's constructed road through a new and sparsely settled country, with an insignificant local business; further the fact that such competing line would be controlled and operated in the interest of a through line to the Missouri River, and could be constructed at less cost, both labor and material being cheap and money obtainable on easy terms, alarmed the holders of the bonds secured by liens on the Denver and Rio Grande Railway in operation, lest if the threat were executed they would be sufferers.

Under strong pressure of the bondholders to prevent if possible the construction of a railway parallel to the one wherein such bondholders were interested respectively, and recognizing the equity of their claims for protection, and at the

instance and request of such bondholders and encouraged by being informed that the Directors of the Pueblo and Arkansas Valley Railroad Company had resolved to advocate consolidation of the two companies on liberal terms, I finally, at some time in September, 1878, assented to improve the opportunity for negotiations opened by such resolution.

Such are the circumstances under which the negotiations were entered into, which resulted in a preliminary memorandum dated October 4th, 1878, of which a copy is hereto annexed marked "C."

Almost simultaneously with the information that the preliminary memorandum had been substantially perfected, and before I had seen such memorandum, I received telegraphic communications from Messrs. Potts and Schlesinger, who had conducted the negotiations, to the effect that unless I approved the plan forthwith, there would be danger that all their labors might prove to be in vain, and that if I proceeded to Boston personally to arrange details of execution with Mr. Thomas Nickerson, I could get better terms, as Mr. Nickerson was disposed to do all that was necessary to meet the necessities of the Denver and Rio Grande Railway Company in the premises.

The preliminary memorandum was not then nor has it since been submitted to, approved or ratified by the Board of Directors of the Denver and Rio Grande Railway Company, nevertheless, finding that the general plan was acceptable to the representative men of the Bondholders, and relying on the assurances aforesaid, I proceeded to Boston on or about the 6th day of October, 1878, to see what arrangements could be made respecting the details of execution. The negotiations in that behalf were almost exclusively carried on between myself, as representative of the Denver and Rio Grande Railway Company and persons interested in it, and Mr. Thomas Nickerson, who is a leading director in both the Atchison, Topeka and Santa Fe and the Pueblo and Arkansas Valley Railroad Companies, President of the former, Treasurer of

the latter, and had, and has now, practically executive control of the affairs of both companies.

In the preliminary memorandum of October 4th it had been stipulated that the debts of the Denver and Rio Grande Railway Company should not exceed $22,664 per mile of its constructed road, of which it had at the time about 337 miles, but that amount represented only the bonded indebtedness and a portion of the floating debt arising from the operation of its then constructed road and matters connected therewith. Aside from this, the Denver and Rio Grande Railway Company had a further indebtedness, usually comprehended under the term or designation of floating debts and liabilities, which had been incurred for work and labor done, materials furnished, services rendered and moneys loaned and advanced, partly on account of constructed road and partly in extending its line of railroad from Cañon City westward through the Cañon of the Arkansas and in other directions provided for in its charter, including in such last named debts the expenses of the litigation concerning the right of way through the said Arkansas Cañon; which floating debt so incurred, at that time amounted as near as I could then ascertain to over $300,000.

As before stated the negotiations had been opened with a proposition to consolidate on liberal terms. I was informed, and believe that during the progress of the negotiations this idea was absolutely abandoned, and that when the plan as set forth in the memorandum of October 4th, was finally adopted it was understood by those conducting the negotiations, that my company's constructed road only, was to be leased subject to the indebtedness incurred on account of its construction and operation; that debts otherwise incurred were to be otherwise provided for, and that all assets of my company, outside of the to be leased property, were to be available for the benefit of my stockholders, so that the debts otherwise incurred were paid. I commenced the negotiations for the arrangement of details, by frankly stating the condition of my

company's finances, and asked that in arranging the details proper provisions be made to protect these debts. But Mr. Nickerson refused, and stated that he and his companies were willing to carry out the terms of the plan of October 4th, strictly, but would not enter upon any new negotiations whatever, as all that had been discussed and settled and he would not go over the same ground again. I pointed out that it would be very embarassing to provide for the payment of these floating debts, some of which were pressing, because as soon as the constructed road of the Denver and Rio Grande Railway Company should be delivered over to the Atchison, Topeka and Santa Fe Railroad Company and the rental be applied as contemplated by the memorandum plan, the Denver and Rio Grande Railway Company would lose control of the earnings and had then no other sources of income; that by the memorandum plan, nothing but constructed road in operation and indebtedness incurred in its construction and operation was covered, and to meet the objection that debts incurred for extension were no proper charge against previously constructed road, I offered to lease not only the constructed road, but also the railway through the Cañon as a consideration for the immediate protection of this debt. I alluded to the great value of the Denver and Rio Grande Railway Company's line through the Cañon by reason of its easy grades, as compared with the value and grades of any other line to the headwaters of the Arkansas, and the value of the grant to the Denver and Rio Grande Railway Company, as compared with the value of the grant under the general law of 1875. But Mr. Nickerson replied that the Denver and Rio Grande Railway Company had no special rights in the Cañon, and refused to consider any proposition except to carry into effect the general plan of October 4th, 1878. During the whole of these negotiations, not one word was said by Mr. Nickerson, or by myself, or anybody else concerned to my knowledge about the settle-

ment of the suits now here pending, and if any suggestion had been made looking towards a settlement of said suits, I should immediately have refused to entertain any such idea or negotiate on that basis, among others, for the following reasons:

An essential feature of the plan was that ten shares more than one-half of the entire capital stock of the Denver and Rio Grande Railway Company were to be interchanged, and that there was to be no lease without such interchange nor any interchange without the lease. The Denver and Rio Grande Railway Company, in its corporate capacity, had no control over its issued stock or any part thereof. I held in my own right about 2,000 shares and did not control the majority or any considerable part of the stock; it was therefore evident that the final execution of the plan depended upon the holders of any 42,510 shares of the stock of the Denver and Rio Grande Railway Company. Mr. Nickerson, however, imposed a new condition, to-wit: That those who desired to further the plan by exchanging the first 42,510 shares should leave on deposit in the hands of the trustee at least 5,000 shares of Pueblo and Arkansas Valley Railroad Company's stock so to be given in exchange until all debts in excess of $22,664 per mile of constructed road were paid, or payment thereof secured, so that in effect, the then individual stockholders of my Company were made to furnish security for the payment of corporate debts incurred by extensions to the extent to which they were respectively interested in the security so deposited.

I became apprehensive that unless I could show a probability that the Company would be able to pay its debts incurred by extensions, from its property, outside of the property to be leased, the holders of a majority of my Company's stock would not assent to interchange under this new imposition, especially not, as the greatest risk would fall on the holders of the first 42,510 shares offered, and thereby the entire plan to protect the bondholders and prevent the construction of a railway

parallel to the constructed road of my Company might fail; however not a word was said by any one to my knowledge, respecting the settlement of this litigation; the negotiations were carried on by me with the sole intent and purpose of preventing the building of a competing railroad parallel to the constructed road of the Denver and Rio Grande Railway Company, wherein its bondholders were interested, which I thought might be accomplished by the plan and not with any intent of settling these controversies involved in these suits and the one then pending in the Ciruit Court of the United States for the District of Colorado. I regard and always regarded the rights of the Denver and Rio Grande Railway Company in the Grand Cañon of the Arkansas, under the Act of 1872, as the most valuable part of my Company's assets, and I did neither intend, nor did I settle or make any agreement, express or implied, to settle the controversies respecting the same, and Mr. Thomas Nickerson, at the time, must certainly have understood my position, and that I considered it my duty under the plan to preserve for my Company, its stockholders and creditors, all my Company's rights to the fullest extent.

The negotiations which extended over nearly a fortnight, finally on October 19th, 1878, resulted in the signing, by me, of a paper, of which I attach a copy, marked "D," there is no agreement whatever between the Denver and Rio Grande Railway Company and Pueblo and Arkansas Valley Railroad Company nor any agreement or other paper between the Atchison, Topeka and Santa Fe Railroad Company and the Denver and Rio Grande Railway Company, except one I signed as hereinafter stated; the originals of which "D" is a copy, were deposited in escrow under the provisions of a certain other paper which is the one above referred to, and of which a copy is also annexed, marked "E," and the said originals of which "D" is a copy, are still held in escrow, because the conditions of the paper of deposit have not yet been complied with by the Atchison,

Topeka and Santa Fe Railroad Company; these are the only papers between the companies. The only other paper in anywise relating to the subject matter referred to, is a personal agreement made by one Alden Speare with me individually, of which I also annex a true copy, marked "F."

No arrangements were made by which the corporate management or control of the Denver and Rio Grande Railway Company has passed to either the Atchison, Topeka and Santa Fe or the Pueblo and Arkansas Valley Railroad Companies or persons in their or either of their interests.

The Pueblo and Arkansas Valley Railroad Company has not a mile of completed railroad west of Pueblo, nor does the Atchison, Topeka and Santa Fe Railroad Company own a mile of railroad westerly of Sargent, a point on or near the boundary line between the States of Kansas and Colorado. True it is that the Atchison, Topeka and Santa Fe Railroad Company pretends to have leased the railroad of the Pueblo and Arkansas Valley Railroad Company, but it is not true that the corporate identity of said Pueblo and Arkansas Valley Railroad Company is merged in that of the Atchison, Topeka and Santa Fe Railroad Company, on the contrary separate organizations are maintained. The Denver and Rio Grande Railway Company likewise is and will, I expect, continue to be a separate organization, there was and is no plan or basis of actual consolidation agreed upon between the Denver and Rio Grande Railway Company or either of the other companies, and there exists no identity of interests between the Denver and Rio Grande Railway Company and either of the other companies named; there are many persons interested as stockholders in one or the other of the several Companies named, and not in all or any of the others.

Respecting the so-called lease and its form and provisions it became apparent at the outset of my negotiations for the arrangements of details that the representatives of the Atchison, Topeka and Santa Fe Railroad Company's and kindred in-

terests intended to cover more than was intended to be covered by it. On Wednesday afternoon, October 9th, 1878, counsel employed by me met the counsel employed by the other side at the office of Mr. Lothrop, in Pemberton Square, Boston. I was present at the interview; I stated to the counsel present the condition of my Company. After some conversation, the counsel employed by Mr. Nickerson dictated the form he proposed for the lease; when dictating the description of the property in the granting clause, he framed the same so that it would have included the right-of way of the Denver and Rio Grande Railway Company for every part of its located line, whether completed and operated or not. The effect of this becoming apparent I refused to consent to the phraseology or any phraseology which included anything in the lease but constructed road in actual operation. Upon this there was a standstill, but after a delay of one or two days, during which this subject was discussed between counsel for the respective parties, Mr. Nickerson's counsel conceded the position taken by me and my counsel; and a form of lease was thereupon prepared by my counsel, which, after having been submitted to the other side and amended, was finally agreed upon. The paper hereto annexed marked "D" is a true copy of the form so agreed upon; it contains a description of the railroad theretofore constructed and operated by the Denver and Rio Grande Railway Company, and a proviso in the granting clause, especially in terms reserving and exempting from its operation the franchise to be a corporation, and all rights and privileges other than those thereby intended to be granted and demised, to-wit: 337 miles of constructed road, property used in, and franchises necessary to its operation.

Litigation is universally believed to be attended by uncertainties, regardless of what hopes might be entertained as to the final result whereon, in this instance, depended whether the Denver and Rio Grande Railway Company or any corporation in the interest of the Atchison, Topeka and Santa Fe Railroad

Company would build through the Grand Cañon of the Arkansas, it became therefore necessary in framing the different papers and especially the clauses of the form of lease to be agreed upon relating to the interchange of traffic, the ascertaining and division of gross earnings, etc., to employ such language as would cover every contingency; had this not been conceded I should not have agreed to it. The construction of a railway from Cañon City to Leadville, it was generally believed by interested parties, would greatly increase the business of the constructed road of the Denver and Rio Grande Railway Company, between Denver and Pueblo, El Moro and Pueblo, and especially between Pueblo and Cañon City. My Company and its bondholders wanted that railway built; the building thereof would also directly benefit the Pueblo and Arkansas Valley and Atchison, Topeka and Santa Fe Railroads, and these Companies wanted that railway built. As it was not likely that the Denver and Rio Grande Railway Company would undertake the construction thereof, except on its located line, which it could not do if the decision of the Circuit Court in these causes were affirmed on appeal, it was agreed that if the Atchison, Topeka and Santa Fe and Pueblo and Arkansas Valley Railroad companies or either of them, or any company or individuals under their or either of their control, or in their or either of their interests, should directly or indirectly build, operate and encourage the building of that railway, it should not be held to be a breach of clause "*a*," of article 3 of the form of lease agreed upon, although the construction thereof by any company or individuals in the interest of the Atchison, Topeka and Santa Fe or Pueblo and Arkansas Valley Railroad Companies, or either would in fact have been the building or encouraging of a line or track, not already constructed, that would compete with the constructed railway of the Denver and Rio Grande Railway Company between Pueblo and Alamosa for the traffic of the San Juan Country.

It was quite as important for my Company to determine

in advance what division should be made of the earnings from business originating west of Cañon City, and going to points east of Cañon City, or vice-versa, if my Company constructed and operated the Leadville extension as if another Company, controlled in the interest of the prospective lessee corporation, built and operated the same, for my company would, provided the lease became effective, be dependent upon the other Company for an outlet; the same rate of division was fixed for both contingencies. The words interchange of traffic or business have a very wide meaning and they are applicable in all instances where it is necessary or proper to keep separate accounts, whether the line of transportation is over a railway entirely owned by one company, or over several railways owned by separate companies, whether the line of transportation is over a railway operated wholly by one company and in one interest or separate parts thereof are operated by separate companies and in separate interests; there may be an interchange of traffic between different divisions of one entire railway owned or operated by one company. In the connections in which these words are employed in article 3 of paper marked "D," their use was proper, as if the lease should ever become effective, it would certainly render the keeping of separate accounts necessary, whether my Company, or the prospective lessee Company, or persons or corporations in its interest operated the Leadville extension; besides though the line from Cañon City to South Arkansas and Leadville through the Grand Cañon is the most favorable for a railway to the headwaters of the Arkansas, there are other lines practicable whereby both South Arkansas and Leadville can be reached, and it is not necessary that in order to reach these points from Cañon City the road should run through the Arkansas Cañon, and should the decision in these cases be reversed and the Denver and Rio Grande Railway Company thereupon extend its line through the Grand Cañon of the Arkansas, there is nothing to prevent the other companies from constructing a parallel or com-

peting line to both said points. The provisions of the paper were so framed as also to cover this contingency. Mr. Nickerson insisted on reserving to his companies the right to build a line from Cañon City to Leadville. I admitted the possibility of their doing so, but I did not admit or intend to admit that one or the other or all of the Companies which Mr. Nickerson represented in these negotiations might construct its or their road or roads on my Company's located line, and right of way appurtenant thereto, and deprive it of its superior right to appropriate the public lands along the line for the purposes of its railway, nor did I or my Company ever in any manner admit or concede the right to do so to any Company or individual whatever.

Both Mr. Nickerson and myself anticipated that a point at or near the mouth of the South Arkansas River on any railway between Cañon City and Leadville, whether it be constructed through the Cañon of the Arkansas, or around the Cañon on any other line north or south of the river, up one tributary and down another, would become a point of supply for the San Juan country, and that such railway, therefore, would be in fact competitive to the constructed road of the Denver and Rio Grande Railway Company between Pueblo and Alamosa. Both of us, for the reasons aforesaid, wanted a railway built between Cañon City and Leadville. So clause "*e*," of article 3, was agreed on to prevent a discrimination in rates whereby the earnings of the railway between Pueblo and Alamosa might be impaired to the injury of the bondholders of the Denver and Rio Grande Railway Company secured by mortgage thereon; an entirely different interest from that of Denver and Rio Grande holders of bonds secured on the line between Pueblo and Cañon City; and it was also agreed between Mr. Nickerson and myself, and inserted in the form of lease agreed on, that any extension of Denver and Rio Grande Railway Company's lines should be of three (3) feet gauge, for the reason that as I had conceded to him the right to lay a third rail on

the Denver and Rio Grande Railway Company's constructed road between Pueblo and the Cañon Coal Mines by way of Labran, a point about eight miles east of Cañon City, and the Pueblo and Arkansas Valley Railroad was being constructed from La Junta to Trindad, near which point there are large deposits of coal furnishing a superior coke, and the coke trade between that point and Leadville and other mining regions was expected to be of great value to railroads connecting the point of manufacture with the points of consumption, and the Denver and Rio Grande Railway Company had its road constructed to the El Moro collieries, and coke is an article that does not well bear transhipment, I wanted to secure that trade for the Denver and Rio Grande Railway, and prevent the transportation from Trinidad *via* La Junta and Pueblo to Labran. I was apprehensive that if a broad gauge railroad were constructed from Cañon City west, means might be found to evade the provisions of clause "*a*," article 3, if the lease became effective, by building a broad gauge line from Labran for that short distance, and thus impair the earnings of the Denver and Rio Grande Railway Company's constructed road; also for the reason that I wanted the constructed road of the Denver and Rio Grande Railway Company between Denver and Pueblo to have a fair share of the Leadville business, which it could not do with a break of gauge at Pueblo or Cañon City.

Neither party as far as I know intended to prevent the other or others from building, in extension of the Denver and Rio Grande Railway Company's constructed road, whether or not such extensions were parallel to, or competing with any railway forming part of the line which the Denver and Rio Grande Railway Company had the right to construct and might thereafter construct, provided the extension was not parallel to, or competing with any then constructed road of the Denver and Rio Grande Railway Company except as aforesaid the extension from Cañon City to Leadville. My object was merely that all business at points from which such extensions

might be built, should be transported over my company's then constructed road, whether at such points the business was gathered, or from such points distributed by one or two or more railroads.

As before stated, under existing circumstances hereinbefore mentioned the successful execution of the plan for the protection of the holders of my company's bonds depended on the holders of any 42,510 shares of my company's stock, and the imposition of the condition that out of the 8,502 shares of the Pueblo and Arkansas Valley Railroad Company's stock which would be furnished by parties in the interest of the Pueblo and Arkansas Valley Railroad Company, for the purposes of such interchange, 5,000 shares should be retained by a trustee until the floating debts of the Denver and Rio Grande Railway Company in excess of its debts over and above $22,664 per mile of constructed road should have been paid or payment thereof secured, rendered it more doubtful whether the assent of holders of a sufficient number of shares could be obtained, especially as the first assenting would, in case more did not consent, run the risk of bearing the entire onus of the condition imposed; it was necessary to provide for this contingency, as well as to show to the assenting parties a reasonable probability that the value of the Company's assets outside of the property to be leased would be sufficient to pay, or at least greatly reduce, these debts, or secure the payment thereof, and that such assets would be controlled in the interest of the Company and all concerned, and also to provide means whereby any deficiency would be borne pro rata by all assenting, and the entire benefit of the plan might be made available to each individual stockholder at his election. With the understanding to secure these objects, it had been agreed between Mr. Nickerson and myself, as stated in article 7, of the form of lease that the prospective lessee corporation, to wit: the Atchison, Topeka and Santa Fe Railway Company, should pay for fuel, material and other

railroad supplies which the Denver and Rio Grande Railway Company should have procured for use on its constructed road, or any part therof, and have on hand at the time possession under the prospective lease should be given, at a price to be determined as in article 7 provided. Also that the Denver and Rio Grande Railway Company should collect and receive all earnings, claims and demands arising from the business and operation of the to be leased railway prior to the delivery of such possession, and that the moneys so received should be applied toward paying the floating debt of the Denver and Rio Grande Railway Company, in excess of $22,664 per mile of constructed road, and with the same understanding, and to further secure the objects above referred to, papers were devised and drafted by counsel, revised and amended by Messrs. Thomas Nickerson and one of his co-directors, Alden Speare, and their counsel on behalf of the other side, and myself and my counsel for my side, and on October 19th, 1878, finally agreed upon between us in form and in substance as shown by copies thereof hereto annexed, marked "E" and "F," respectively. Under the provisions of the paper, marked "E," which I signed on behalf of my company, although it had not been approved by the Board of Directors of my company the form of lease was deposited in escrow, pending,

FIRST. *A.* The ratification of the form of lease by the stockholders of the Denver and Rio Grande Railway Company.

B. The ratification thereof also by the Board of Directors of the Atchison, Topeka and Santa Fe Railroad Company.

SECOND. The deposit of the sum (when fixed as in article 7 of the form of lease provided), which was to be paid by the Atchison, Topeka and Santa Fe Railroad Company for fuel, material and other supplies as aforesaid, with the Trustee, with whom, under that paper, the form of lease was deposited in escrow.

THIRD. *A.* The deposit by Mr. Speare of 8,502 shares of non-assessable stock of the Pueblo and Arkansas Valley Railroad Company with a trustee and,

B. The deposit by me of 42,510 shares of Denver and Rio Grande Railway Company's stock with the same trustee.

The paper further provides that the trustee with whom said form of lease was and executed copies thereof subsequently were deposited in escrow, should at the time of delivering the executed papers pay over to the Denver and Rio Grande Railway Company the price fixed for the fuel and supplies, and unless the respective parties should severally perform their respective parts the "lease" should have no validity.

Of these acts so to be performed there were performed, as far as I know, all I or the stockholders of my Company were required to do, inasmuch as I deposited the 42,510 shares, as provided, and the stockholders on November 29th, 1878, ratified the lease on condition that the provisions of the escrow paper be complied with. As far as I am informed Mr. Speare deposited the required number of shares in Pueblo and Arkansas Valley Railroad Company's stock, and the Directors of the Atchison, Topeka and Santa Fe Railroad Company authorized the execution of and ratified the form of lease, but the price for fuel, material and supplies has not been paid over to the Denver and Rio Grande Railway Company, and the executed forms of lease have not yet been delivered and are inoperative.

The agreement between myself, in my individual capacity, and Mr. Alden Speare was made in part execution of the memorandum plan, and with the objects and understanding above referred to; in order to secure the equal pro rata distribution of the onus of the imposed condition as well as of the benefits to be derived from the reservation of all assets outside of the to be leased property. I insisted that whatever interchange of stock was made should be made through me and not

directly with any other person holding Denver and Rio Grande Railway Company's stock, as I was apprehensive that unless this was done persons in the interest of either of the other Companies might by purchasing Denver and Rio Grande Railway Company's stock at reduced prices secure by direct interchange such benefits as were derived therefrom for themselves without, at the same time, bearing part of the burden, and thus increase the onus of the holders of the stock exchanging through me.

Because his honor, Judge Hallett, who rendered the opinion of the Court on the cross motions for injunctions in these cases, now here on appeal had decided that with a line located and in process of construction from point to point, no other Company would be allowed to interfere with my Company's right of way, and as it was thought my Company had brought itself within this decision on the upper part of the Cañon and footing thereon, had commenced suit against the Pueblo and Arkansas Valley Railroad Company as aforesaid, I and the Board of Directors of my Company determined, lest we should prejudice the case, to continue the construction of the extension on so much of our located line as was also claimed by the Pueblo and Arkansas Valley Railroad Company. The lines located by the Denver and Rio Grande Railway Company and the Pueblo and Arkansas Valley Railroad Company, respectively, were in many places identical or in so close proximity that the line located by the latter necessarily encroached upon the right of way and the public lands which my company claimed the superior right to appropriate for the purposes of its Railway.

The Denver and Rio Grande Railway Company was at the time, October 19th, 1878, constructing, and has continued to construct and is now constructing its line in the Upper Arkansas Cañon. Mr. Nickerson knew we were engaged in such construction, but it was not until towards the close of the negotiations that he mentioned the matter, and asked me to join in a telegram to the manager of his company out west.

I declined to do so, because, although not a lawyer, it seemed to me on a hasty perusal that it might be intended to cover more than the written agreements which we had been discussing for two weeks, and which were practically completed and were about to be signed, called for.

Mr. Nickerson, during the discussion respecting the provisions of the lease, knowing then we were constructing, insisted on adding to article 8 of the form of lease, a clause that the prospective lessee company should not be obliged to assume contracts for construction, which as I understand was to protect the prospective lessee against any contract or agreement we might have with our contractors including the customary requirements to transport men and material employed in construction of the new railway over the constructed railway from points thereon to the end of the track.

The agreement with Mr. Speare in view of the fact that the Denver and Rio Grande Railway Company was at the time constructing, and that the lines of the Pueblo and Arkansas Valley Railroad Company and the Denver and Rio Grande Railway Company, as located, were nearly identical and some of the work done by the Denver and Rio Grande Railway Company could be used to advantage (in the event that after an adverse decision it could not build on or retain possession of its located line) by the other company, which should be determined by the courts to have a superior right to such line, it was thought but fair that if such work were taken or used by such other company it should be paid for, or its value allowed against debts in excess of $22,664 per mile and the agreement accordingly so provided.

There was nothing said or understood that this provision covered work done up to that time only, but on the contrary it was to cover all work done that the other companies might (if the decision should prove unfavorable to the Denver and Rio Grande Railway Company) use or that might at any time accrue to the benefit of the Pueblo and Arkansas Valley Railroad

Company or other corporation in the interest of the Atchison, Topeka and Santa Fe Railroad Company; and the Denver and Rio Grande Railway Company was neither compelled to surrender such work nor was the Pueblo and Arkansas Valley Railroad Company or other corporation bound to take and use it. None of the work has in fact been surrendered by the Denver and Rio Grande Railway Company, which has continued construction without interruption to this day and is now constructing. The main object I had in view was to secure for my stockholders a minimum, to which they would become entitled through me in the event of an unfavorable decision on these appeals and in the case pending in the Circuit Court of the United States for the District of Colorado, and not to cut them off from any benefits accruing thereafter by reason of the determination of this court on these appeals or otherwise.

The entire interchange of stocks is on my part merely optional. The agreement with Mr. Speare contains no provision binding me to make any interchange, not even the first 42,510 shares. I am under no obligations to Mr. Speare or to the parties who have deposited or may deposit their Denver and Rio Grande Railway Company's stock with me to exchange the same or any part thereof for Pueblo and Arkansas Valley Railroad Company's stock, and the shares which I have deposited with Mr. Coolidge as trustee under the terms of the said agreement between me and Mr. Speare, constitute a bare majority of the stock issued at the present time, and is all subject to be returned to me by the terms of said agreement. The expression in that agreement to the effect that the constructed road of the Denver and Rio Grande Railway Company and its stock should be controlled in the interest of the Atchison, Topeka and Santa Fe Railroad Company had reference to stock theretofore issued on account of constructed road, as the rate of interchange of stocks was based on the amount of debt incurred and stock issued against constructed

road. But the lease and agreement between Mr. Speare and me were parts of one plan. There was to be no interchange of stocks under the latter without a lease and no lease without an interchange of stock to the extent of 42,510 shares of Denver and Rio Grande Railway Company's stock.

And when on the evening of the nineteenth day of October, 1878, the papers, i. e. the form of lease, escrow paper and agreement between Mr. Speare and myself had been agreed on and been signed, I asked Mr. Speare; "Shall we put this in escrow also with Mr. Schlesinger?" he assented and the said agreement was thereupon handed to Mr. Schlesinger who as I am informed and believe, has held it ever since and now holds it together with said form of lease.

It was always understood in my negotiations for arrangement of details, as well as in the negotiations carried on by Messrs. Potts and Schlesinger, resulting in the preliminary memorandum plan, (as these gentlemen informed me, and I believe) that persons holding Denver and Rio Grande Railway Company's stock should not be compelled to interchange and might at their election exchange the whole or any part of the Denver and Rio Grande Railway Company's stock held by them, respectively, or retain the same, in whole or in part, with all the rights incidental to the shares so retained. And it was always understood by parties who deposited their shares with me, as hereinafter stated, that the exchange beyond 42,510 shares, whereon depended the possibility of rendering the lease effective and of preventing the building of a railway parallel to and competing with the constructed road of the Denver and Rio Grande Railway Company between Pueblo and Denver and Cañon City, was entirely optional with me, and depended upon whether I in my judgment or discretion should deem it to the best interests of all concerned to make further exchanges. It is also generally understood by parties depositing their Denver and Rio Grande Railway Company stock with me, that in case I make no

further exchanges within the periods limited by said agreement with Speare, they would severally be entitled to a beneficiary interest in so much of the Denver and Rio Grande Railway Company's stock as they would hold certificates of deposit for, in the same proportion to the amount of shares thereby evidenced to have been deposited with me, as the number of shares deposited with me and not exchanged shall bear to the entire aggregate amount of shares deposited with me.

On November 11, 1878, I issued a circular with a view of inducing all the holders of Denver and Rio Grande stock to participate pro rata in the benefits of the plan and share pro rata the onus thereof. I stated in it that the interchange of stocks was not a matter of agreement or right between the companies but simply a personal undertaking, whereby I sought to secure to all the stockholders joining, the advantages which could be derived only through me. I alluded in it to the value which Pueblo and Arkansas Valley stock would acquire if all the trade of the Denver and Rio Grande Railway Company's constructed line and that of the Leadville extension, meaning by whomsoever built, should pass over the Pueblo and Arkansas Valley Company's railway by virtue of the lease and to the fact that all trade to and from the Pueblo and Arkansas Valley Railroad Company lines, meaning the line from the boundary line of Kansas to Pueblo, and its other line from La Junta to the boundary line of New Mexico, would earn a rebate of 15 per cent. of the gross earnings of the Atchison, Topeka and Santa Fe Railroad company, from its carriage over that company's railroad a distance of 470 miles and by reason thereof the prospects that the bonded debt of the Pueblo and Arkansas Valley Railroad Company would be quickly reduced or cancelled without preventing current dividends seemed exceedingly good, as the traffic from the constructed Denver and Rio Grande Railway which had not theretofore passed over that road was of itself considered in value equal to a dividend on the stocks of the Pueblo and Arkansas Valley and Atchison,

Topeka and Santa Fe Railroad Companies. I also stated that the Denver and Rio Grande Company had a large floating debt which would have to be paid and which might be materially reduced depending on the value of the assets of the Denver and Rio Grande Company not covered by the lease, all of which assets were specially reserved and exempted.

I stated therein that in carrying out this arrangement I would obtain for and distribute to all assenting, equal benefits, thus securing to the minority the same privileges as the majority.

As the stock came in and was deposited with me I issued certificates of deposit sating the number of shares deposited with me against which each certificate was issued, the name of the party who made such deposit and entitling the holder to a pro rata benefit in all results. The certificates were made transferable on my books by the owner in person or by attorney, and on surrender.

On January 1, 1879, I had issued certificates evidencing the deposit of about 44,000 shares.

On February 1, 1879, I had issued certificates evidencing the deposit of about 69,000 shares, and March 1, 1879, I had issued certificates evidencing the deposit of about 70,900 shares, and as near as I can ascertain at the present time I have issued certificates evidencing the deposit with me of 71,727¾ shares. Of these I deposited with Mr. Coolidge according to the terms of my agreement with Mr. Speare 42,510 shares leaving at present 29,217¼ shares which I hold in trust as aforesaid.

The certificates I so issued are bought and sold in the open market in New York and other places, and I am accountable to hundreds of persons and parties for the faithful execution of my trust, and I am advised by my counsel and believe that it is my duty as such trustee to protect my *cestuis que trustent* to the best of my ability and not allow the

assets to be wasted or any rights appertaining thereto to be abandoned or surrendered without adequate compensation.

On or about the 27th day of October I received information from Mr. Nickerson that the case of the Denver and Rio Grande Railway vs. the Pueblo and Arkansas Valley Railroad Company would come up in court at Denver, which case involves disputes between said companies respecting the right of way in the Upper Arkansas Cañon. I replied that the suit must be proceeded with; cross motions for injunctions were thereafter brought up in said suit, but his honor, Judge Hallett, refused to determine the issues on such motion as the trial of the case would take place early in December. In December, 1878, the case was tried, the trial lasted through that month and into the month of January. When the testimony was closed a motion was filed by the Pueblo and Arkansas Valley Railroad Company for leave to file an amended cross-bill, leave was granted and such proceedings had thereafter that in February, 1879, the case was argued and decision reserved.

On March 8th, 1879, his honor, Judge Hallett, made an order in said suit allowing the Pueblo and Arkansas Valley Railroad company to file a further amended cross bill within 15 days, as said company had not made proper averments and proofs of its alleged consolidation with the so-called Cañon City and San Juan Railroad company, and allowing the Denver and Rio Grande Railway company 20 days to answer such further amended cross bill.

It is untrue that there is any contract or agreement existing between the Denver and Rio Grande Railway company and the Atchison, Topeka and Santa Fe Railroad company whereby the latter corporation has the selection of two-thirds of the Directors of the Denver and Rio Grande Railway company and the other third is to be selected by the bondholders of said last named company. The stockholders of the Denver and Rio Grande Railway Company, at their last an-

nual meeting on November 29, 1878, re-elected the old Board of Directors to hold their office for one year or until their successors shall be duly elected. No change in the present Board of Directors can take place during the remainder of that period except by death or voluntary resignation in which event the vacancy will be filled by the remaining members.

The form of lease deposited in escrow provided that possession of the property therein described as to be leased should be given to the corporation therein mentioned as lessee by the company therein named as lessor, on December 2d, 1878, but at that time owing to the neglect or wilful delay of Mr. Thos. Nickerson, the persons to appraise the fuel, material and supplies had not been named nor had an umpire been agreed on to determine disputes between the appraisers. Nothing had been done towards fixing the price to be paid for such fuel, material and supplies; notwithstanding however the plain provisions of the escrow paper and of article 7 of the lease, Mr. Nickerson demanded possession, which I, in view of such provisions and the resolutions of the board and stockholders, refused. A failure of the entire plan became imminent. The Board of Directors of the Atchison, Topeka and Santa Fe Railroad company, for the purpose of coercion, resolved, as I am informed and believe, to declare the whole negotiations null and void. An immense pressure was brought to bear upon me to yield, and when Mr. Chas. F. Woerishoffer of New York, proposed a compromise which he incorporated in a letter to Mr. Nickerson of which a copy is annexed marked K, and Mr. Nickerson made reply of which a copy is also annexed marked L, I transferred on December 13, 1878, midnight, possession of the property to be leased to the Atchison, Topeka and Santa Fe Railroad company, with the understanding that such transfer of possession was conditioned upon the lease becoming effective, and that in the meantime the property was to be operated upon the terms and conditions of the lease in escrow.

The appraisement of the fuel, material and supplies has not been finished and the payment of the price therefor has not been made to the Denver and Rio Grande Railway company except the payment on account in said correspondence referred to, and all the papers are still held in escrow, and have not been delivered.

I issued the orders in the moving papers referred to on the assurances of Messrs. Woerishoffer and Schlesinger that the entire plan would be carried out in good faith, and with a view of avoiding injury to the business of the road which would naturally arise in case it were known that the transfer of possession was merely conditional and shippers, employees and connecting roads would be by reason thereof left in a state of uncertainty with whom they were dealing.

I transferred possession of the constructed road only, and termed the property so transferred "leased" because I trusted to assurances that the plan would be executed and that the lease as soon as it became effective with all its covenants and agreements would relate back to the time of giving possession, which was given with the understanding on my part that such action would in no wise prejudice or waive any rights my company then had or might have should the lease not become operative, thereafter and during the period it should not be operative and effective in all its parts. There has been no consummation of the plan.

On January, 30, 1879, the said Atchison, Topeka and Santa Fe Railroad Company paid $21,118.13 for use of the constructed road in December, 1878, and accepted a receipt from the treasurer of the Denver and Rio Grande in the following form:

$21,118.13.

Received, Colorado Springs, Colo., January 30th, 1879, of E. Wilder, Treasurer of the Atchison, Topeka and Santa Fe Rail Road Company, the sum of Twenty-one thousand, one hundred and eighteen 13-100 Dollars, being forty-three per cent. of Forty-nine thousand, one hundred and eleven

94-100 Dollars, which is the amount of the Gross Earnings of the Denver & Rio Grande Railway from December 14th to December 31st, 1878, inclusive, as shown by the accounts compiled by J. W. Gilluly from the reports of the Agents & Conductors of the said Atchison, Topeka & Santa Fe Railroad Company and other sources, provided however, that none of the claims or rights of either party in respect to the adjustment of the Gross Earnings for the period named, and which may not have been recognized in compiling the said Earnings, shall be in the least prejudiced by the said payment or this receipt. The said payment shall apply towards the amount due for the use of the said Railway, during said period and shall not prejudice or affect the rights of either party, or be held to affect the validity or to ratify either or any of the papers now held in escrow by S. B. Schlesinger of Boston.

THE DENVER & RIO GRANDE R. W. CO.,
By R. F. WEITBREC, Treas'r.

On February 28, the said Atchison, Topeka and Santa Fe Railroad Company as condition of payment for use of the road during January demanded an unconditional receipt which was refused and thereupon no payment was made.

A consolidation was once projected but never agreed on or executed in any form, as aforesaid, and no consolidation of the Atchison, Topeka and Santa Fe Railroad company or any other comyany with the Denver and Rio Grande Railway company was ever contemplated or carried out. The issue by the executive committee of the Pueblo and Arkansas Valley Railroad company to Alden Speare of 17,000 shares of Pueblo and Arkansas Valley Railroad stock for the benefit of the Atchison, Topeka and Santa Fe Railroad company and the declaration of Speare that he held and would hold the Denver and Rio Grande stock he might receive in exchange and pay all dividends accruing thereon to the Treasurer of the Atchison, Topeka and Santa Fe Railroad company, is contrary to the understanding had at the time of the deposit of the papers in escrow that as a condition of the signing by me of said papers all such stock and dividends should not be held or collected for the benefit of the Atchison, Topeka and Santa Fe Railroad company and is in violation thereof.

And I am advised and believe that if the Atchison, Topeka and Santa Fe Railroad company or Pueblo and Arkansas Valley Railroad company, or said Speare or Coolidge, by virtue of my deposit with the latter have any control over 10 shares more than one-half of the capital stock issued of the Denver and Rio Grande Railway company, they, or either of them, have no more or greater rights and powers by virtue thereof than the majorities in monied corporations for pecuniary profit usually have, and cannot deprive a minority of their rights and interests in the property of the company.

Soon after the decision was rendered by this court in the case of the Missouri, Kansas and Texas Railway company vs. the Kansas Pacific Railroad company, which was published at Chicago in the *Railway Age* on January 9th, 1879, I learned for the first time that steps were taken to set aside the submission herein. I am informed and believe that Mr. Nickerson made application to Mr. Schlesinger, as one of the original negotiators, to support him in his claims that this litigation had been settled, to which Schlesinger replied in writing, and sent me a copy of his letter, of which I annex a copy, marked IX.

As regards the provisions of the agreement with Mr. Speare for the disposal by me of the assets of the Company, the same was intended only to prevent just such efforts to impair the value of the Company's assets as the present, and I have never assumed to exercise, individually, any control over such assets, and whatever disposition thereof has been made was made by and with the authority of the Board of Directors.

I am advised and believe that the Board of Directors of a corporation are trustees for all its stockholders, who being numerous and scattered are unable, acting separately and individually, to efficiently protect their interests, and that it is

the duty of directors to protect all stockholders equally. The corporate existence of the Denver and Rio Grande Railway Company will be maintained. The directors, even if hereafter elected by parties representing hostile interests, but who may, for the purposes of election, succeed in acquiring a majority of the stock, have, as I am advised and believe, no power to alienate, abandon or surrender the rights of the Denver and Rio Grande Railway Company set up and insisted on in this litigation, even if such action be demanded by a majority.

Subscribed and sworn to before me this 10th day of March, A. D. 1879.

WM. J. PALMER.

ERNEST P. STEPHENSON,
Notary Public, El Paso Co.

C.

MEMORANDUM OF AGREEMENT.

POTTS-SCHLESINGER AGREEMENT.

MEMORANDUM OF AGREEMENT, To be made between the Atchison, Topeka and Santa Fe Railroad Company, represented by its President Thomas Nickerson, the Pueblo and Arkansas Valley Railroad Company, represented by its President Joseph Nickerson, and the Denver and Rio Grande Railway Company represented by Joseph D. Potts and Sebastian B. Schlesinger.

First. The A., T. & S. F. R. R. Co. is to take a lease of the D. & R. G. R'y Co., to terminate November second, A. D., nineteen hundred and eight, and is to operate the road of the D. & R. G. R'y Co., paying as rental thirty-five per cent. of the gross earnings of the leased road, and such further percentage thereof as may be agreed on by the Presidents of the two roads, or in default of their agreement, as shall be fixed by a referee to be agreed on by them, whose award shall be final.

And in estimating the gross earnings on passengers and freight carried over the D. & R. G. R'y and also over the whole or a part of either of the other roads named, each mile of transportation over the D. & R. G. R'y shall be reckoned equal to one mile and one quarter on either of the other roads named, except that transportation over the Leadville or Cañon City branch shall be reckoned as equivalent mile for mile.

Of the above named rental, any surplus after paying interest on the bonds and debt of the D. & R. G. R'y Co. shall be devoted to the purchase and extinguishment of the bonds and debt of the D. & R, G. R'y Co., at the best market price, to be ascertained by advertising for bids, but at not exceeding ten per cent. above par.

In case of competing trade, an equitable division of the traffic shall be made.

The P. & A. V. R. R. Co. agrees to purchase within one year from the date hereof all the stock of the D. & R. G. R'y Co., which shall be offered it from time to time as offered after the second day of November next, paying one share of its own stock for every five shares of the stock of the D. & R. G. R'y Co., and the D. & R. G. R'y Co. agrees that it will furnish or cause to be conveyed at the above rate, at least ten shares more than one-half of its entire capital stock, within sixty days from the date hereof.

The P. & A. V. R. R. Co. guarantees that its total debt does not exceed eleven thousand seven hundred and eighty dollars per mile of constructed road, and that its stock does not now exceed fifteen thousand four hundred and thirty-eight dollars per mile of constructed road; and the D. & R. G. R'y Co. guarantees that its total debt does not exceed twenty-two thousand six hundred and sixty-four dollars per mile of constructed road, and that its stock does not exceed twenty-five thousand two hundred and twenty dollars per mile of constructed road.

The directors of the A., T. & S. F. R. R. Co. shall nominate two-thirds of the board of directors of the D. & R. G. R'y Co.

The lease above mentioned to take effect on the second day of November next, or as soon thereafter as may be practicable, and the D. & R. G. R'y Co. agrees to make a lease on the foregoing terms. The lease is to be in the usual form; details to be arranged hereafter.

Pending the completion of this contract, it is mutually agreed that friendly arrangements shall be made as far as practicable.

Dated the fourth day of October, A. D. 1878.

ATCHISON, TOPEKA AND SANTA FE R. R. CO.,
By THOS. NICKERSON, *Pres't.*

PUEBLO AND ARKANSAS VALLEY R. R. CO.,
By JOS. NICKERSON, *Pres't P. & A. V. R. R.*

DENVER AND RIO GRANDE R'Y CO.,
By SEBASTIAN B. SCHLESINGER,
By JAS. D. POTTS,

Subject to the approval of the President of the D. & R. G. R'y,

D

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LEASE.

D. & R. G. R'y Co. to The A. T. & S. F. R. R. Co.

THIS INDENTURE, made this day of October, A. D. 1878, between the Denver & Rio Grande Railway Company, a corporation duly organized and existing, owning and operating a railroad line in Colorado, party of the first part, and the Atchison, Topeka & Santa Fé Railroad Company, a corporation duly organized and existing under the laws of Kansas, party of the second part, witnesseth:

That in consideration of the sum of one dollar to it duly paid by the party of the second part at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and of the rents, covenants and agreements hereinafter reserved and contained, on the part and behalf of the party of the second part to be paid, kept and performed, the party of the first part to these presents has granted, leased and demised, and by these presents does grant, lease and demise unto the party of the second part, its successors and assigns, all and singular the railroad which the party of the first part has heretofore constructed and operated in Colorado, commencing in the city of Denver and

extending thence southwardly *via* Colorado Springs to Pueblo, on the Arkansas River; thence, still in a southerly direction, *via* Cucharas to El Moro, in Colorado, and to the El Moro collieries; and also from Cucharas westward *via* La Veta and Garland to Alamosa, on the Rio Grande del Norte; and also from Pueblo westward, up the valley of the Arkansas River to Cañon City and the Cañon coal mines—in all about three hundred and thirty-seven miles of railroad, more or less, exclusive of sidings; together with the lands and premises occupied by or connected therewith; together, also, with the rolling stock, equipment and appurtenances to the railroad hereinbefore described belonging or in anywise appertaining and owned or acquired by the party of the first part in connection therewith; also all rights, privileges and franchises of the said party of the first part necessary to the operation and management of said hereinbefore described railroad or the business thereof; including in the said premises hereby demised all the railroads, ways and rights of way; all the depot grounds, tracks, bridges, viaducts, culverts, fences and other structures, depots, station houses, engine houses, car and freight houses, and other buildings, machine shops and other shops, machinery and tools, and all other lands and property whatsoever belonging to the party of the first part, and which have heretofore been used or acquired for use in connection with the said hereby demised railroad or the business thereof;

Provided, however, That nothing herein contained shall operate to grant or demise, or be construed to include the franchise to be a corporation heretofore conferred upon the said party of the first part or the corporators thereof, or any other right, privilege or franchise which is or may be necessary or requisite to preserve the corporate existence and organization of the party of the first part; and all such franchises to be a corporation, and all rights and privileges, other than those hereinbefore granted and demised, are hereby expressly reserved and exempted from these presents.

TO HAVE AND TO HOLD the said hereinbefore described railroad and premises with the appurtenances unto the party

of the second part, its successors and assigns, from the first day of December, 1878, for and during, and until the full end of, the term of thirty years thence next ensuing, and fully to be complete and ended, the said party of the second part, its successors and assigns, yielding and paying therefor unto the party of the first part, its successors and assigns, during the said term hereby granted the rent hereinafter specified and in the manner hereinafter provided, and keeping and performing all and singular the covenants and agreements hereinafter set forth, to be by the said party of the second part kept and performed, subject, nevertheless, to debts contracted by the party of the first part, whether the same shall be secured by mortgage lien or otherwise howsoever or unsecured, not exceeding in the aggregate at the date of delivery of the demised premises the sum of twenty-two thousand six hundred and sixty-four dollars per mile of constructed road, including any liabilities of the party of the first part for damages to persons or property carried or injured, or for salaries, or non-fulfillment of contracts up to the period of the delivery of the leased property to the party of the second part, or incurred under the administration of the company prior to such delivery, and which hereafter shall become debts, but exclusive of stock, and any excess of such debts and liabilities, exclusive of stock, of the party of the first part over and above said sum, said party of the first part agrees and guarantees to pay or provide for. The party of the first part also covenants that the stock issued by it does not exceed eight million five hundred thousand dollars. And in consideration of the premises, the parties hereto have further covenanted, promised and agreed, and by these presents do covenant, promise and agree, each for itself and its successors and assigns, to and with the other party hereto, its successors and assigns, as follows, to-wit:—

ARTICLE 1. The party of the second part shall and will, at its own proper cost and expense and without deduction from the rent hereinafter provided to be paid to the party of the first part, manage, operate, use, and run the said demised

railroad and property at all times during said term in the same manner as the party of the first part, as the owner thereof, or otherwise, is now or shall or may at any time hereafter during said term be required by law to do; and using, operating, and running the same, the said party of the second part shall and will, at its own proper cost and expense and without deduction from said rent, at all times during said term maintain, preserve, and keep the said demised railroad and premises, fixtures and appurtenances, and every part and parcel thereof in thorough repair, working order, and condition, and fully supplied with motive power, rolling stock, and equipment, and make all needful and proper additions thereto and improvements thereon, so that the traffic and business of the said demised railroad shall be preserved, encouraged, and developed, and that the same shall be at all times done with safety and expedition and the public be accommodated in respect thereto with all practicable conveniences and facilities, and that all future growth or increase of such traffic and business as the same may arise or be reasonably anticipated shall be fully provided for and secured. And the party of the second part promises, covenants, and agrees to meet the obligations of the party of the first part to the public by making from time to time and whenever needed or required such repairs, renewals and replacements, additions and improvements, in manner and for the purposes aforesaid, and to make all reasonable efforts and use all lawful means to maintain and preserve, develop and increase, all the business of said demised railroad.

ARTICLE 2. The said party of the second part shall and will at all times during said term, at its own proper cost and expense and without deduction from the rent aforesaid, employ all such officers, superintendents, employees and workmen, as shall be necessary to fully carry out the purposes of Article 1.

ARTICLE 3. The party of the second part, for itself, its successors and assigns, hereby covenants, promises and agrees to and with the party of the first part, its successors and assigns, in consideration of the execution to it of this lease that the said party of the second part shall and will, well and

truly apply and pay, or cause to be paid in manner hereinafter provided as and for rent of the herein demised property,

For the first year forty-three per centum,
For the second year forty-two per centum,
For the third year forty-one per centum,
For the fourth year forty per centum,
For the fifth year thirty-nine per centum,
For the sixth year thirty-eight per centum,

For the seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth and fourteenth years, thirty-seven per centum, and for the sixteen remaining years of the term thirty-six per centum of the total gross earnings of said demised railroad and the business thereof to be made up in the usual manner and as hereinafter provided; and it is further agreed that for the purpose of ascertaining and determining the amount of gross earnings upon and from which the rent aforesaid shall be computed and paid, the following principles shall govern: whenever any passenger or freight shall be carried over the said demised railroad, or any part thereof, and also over the railroads of the party of the second part or of the Pueblo & Arkansas Valley Railroad Company, built or to be built, or any part of either, said party of the first part shall be, for each mile of such transportation over the demised railroad, entitled to share in the distribution of fare and freight moneys, as if the same were carried one mile and a quarter, except that transportation of business passing over that part of the hereby demised premises extending from Pueblo westward up the valley of the Arkansas River to Cañon City, or any part thereof, and likewise over the line from Cañon City to Leadville, shall only be reckoned mile for mile, it being the intention of this provision that the gross earnings from all business interchanged between said demised railroad, or any part thereof, and the railroads owned or controlled by the party of the second part or by the Pueblo & Arkansas Valley Railroad Company, built, or to be built, or any part of any of them, shall be divided on the basis of crediting each mile of transportation over the hereby demised railroad, as one and one quarter miles; ex-

cept where such business shall be interchanged between the demised line connecting Pueblo with Cañon City, and the road which may connect Cañon City with Leadville, in which case the gross earnings thereof shall be divided *pro rata* according to the number of miles hauled over the respective roads.

The said party of the second part hereby covenants and agrees:—

a. That neither the Atchison, Topeka & Santa Fé Railroad Company, nor the Pueblo & Arkansas Valley Railroad Company, nor any other company which either of them may now or hereafter control, shall directly or indirectly build or operate or encourage any line or track not already constructed that may be parallel to or competing with any constructed Denver and Rio Grande line, or impair the earnings or security thereof, nor lay a third rail or alter the gauge of any part thereof (except between Pueblo and the coal mines east of Cañon City) without at the same time widening the gauge or laying a third rail over all Denver and Rio Grande Railway lines.

But the foregoing section shall not be construed to mean that any line between Cañon City and Leadville, or any extension beyond Leadville is a competing line with any such constructed Denver and Rio Grande line.

And any line that may be built from any terminus of the Denver and Rio Grande lines, or in extension thereof, shall be of three feet gauge.

b. That the line of transportation *via* Pueblo to and from Denver and the Missouri River and all other points on any of the railroads owned, operated or controlled by the party of the second part shall be kept open on equal terms with any other line or lines between Denver and such river or other points respectively for the carriage of freight and passengers, so as to enable the parties hereto to compete with any other line out of or into Denver, and that it will not make or enter into any agreement or understanding with any competing railroad for any division of business, territory or earnings which shall in any tend to injure or diminish the business or

earnings of the railroad hereby demised without in some manner securing to the said railroad a proportionate benefit and advantage.

c. That where any traffic can be carried at the election of the lessees either over the railroad hereby demised or over some other of the railroads owned, controlled or managed by the said party of the second part, then and in all such cases it shall be transported by the shortest line; and generally that in all cases of traffic wherein the said party of the second part but for this agreement and the covenants herein might be able or endeavor by fixing rates or in any other manner, to divert business from the said hereby demised railroad or any part thereof, the said party of the second part shall not so divert or endeavor to divert any such business to the injury of the said demised road, but an equitable division of such business shall be made between them; and the local and other rates on the said demised road shall not be fixed or adjusted so as to impair or diminish the earnings thereof.

d. That the rates of freight on Cañon coal to all points on the lines owned or controlled by the party of the second part, east of the city of Pueblo, shall not be higher than on coal from Trinidad, or El Moro and vicinity, in Southern Colorado, to the same point.

e. That the rates of transportation between the South Arkansas and Pueblo, or any point east or north of Pueblo, shall not be less than the rates on business between Alamosa and Pueblo, or said other points east or north of Pueblo.

The rent hereinbefore reserved shall be paid monthly, and it being provided herein that the term hereby granted shall begin on the first day of December, in the year eighteen hundred and seventy-eight, it is hereby further agreed and declared that the rental provided to paid as aforesaid shall commence to run on that day, and the instalment for the first calendar month shall be payable on or before the last day of the calendar month next succeeding such first month, and thereafter such payments shall be made for each month on or before the last day of each succeeding month.

ARTICLE 4. The said party of the second part shall and will at all times during said term keep insured to the same extent as its other leased similar property, the rolling stock, tools and machinery, buildings, bridges or other structures erected upon the premises hereby demised, and all other property usually insured by railroad companies, and shall and will from time to time, and as often as the same shall become due, also pay and discharge, without deduction from the rent aforesaid, any and all premiums for such insurance, and also any and all taxes, assessments, duties, imposts, and charges whatsoever which shall or may be levied, assessed or imposed during the said term by any governmental or lawful authority whatsoever upon the said demised premises and railroad or any part thereof, or upon any business or earnings or income of the same, or upon the party of the first part with respect to the said railroad and premises, or any part thereof, or any business or earnings or income thereof, or upon the party of the first part for or in respect to any money which shall be paid or which shall become payable to the party of the first part as or on account of the rent hereinbefore reserved, or any money which shall be paid or become payable to the party of the first part in pursuance of these presents or with respect to any interest or rights under these presents or upon such money, interests, or rights, or which shall or may be hereafter assessed or imposed upon the party of the first part upon the amount of its capital stock by or under any governmental authority which is or may be exercised over any territorial jurisdiction within which any part of the said railroad or premises is or may be situated; it being the true intent and meaning of these presents, that all governmental charges upon the aforesaid property or the income to be therefrom derived, which may be imposed by or under any governmental authority capable of enforcing such charges against or on the said property or the corporation owning or leasing the same, shall be paid and satisfied by the party of the second part, however the forms thereof may change during the term of these presents, but that the said party of the second part shall not become liable to pay any tax imposed upon stockholders personally in re-

spect to stock held by them or dividends or income derived by them therefrom, which shall be collected from such stockholders personally, without the intervention or service of the party of the first part or any of its officers or agents. And the party of the second part shall and will also at all times during the said term allow and pay to the party of the first part, and without deduction from the rent aforesaid, and as part of the necessary expense of carrying on the business of the said demised railroad, the cost of meeting the coupons and dividends of the party of the first part wherever due, and of the transfer of its bonds and stocks and of issuing certficates therefor wherever such transfer and issue is made, and of preserving and maintaining its corporate organization. And it is further agreed that the party of the second part will pay the current expenses of the party of the first part in preserving its corporate existence, maintaining its general offices, and paying the salaries of its officers during the month of December, 1878, and until the adjustment and settlement of accounts and transactions up to and growing out of the transfer provided by this lease, and not exceeding in all ten thousand dollars.

ARTICLE 5. The said party of the second part shall and will at all times during said term and the continuance of this lease keep an office in the city of Pueblo, Colorado, which shall be open at all reasonable hours and times for the transaction of the business of the said demised railroad, and at such office, under the direction of an auditor to be appointed by the party of the first part, its successors or assigns, whose salary shall be paid by the party of the second part, its successors or assigns, as part of the operating expenses of said demised railroad, keep full, true and just accounts of any and all moneys received, and business done upon said demised railroad, and the character thereof, and of all moneys paid, laid out and expended, and liabilities incurred in connection with the same, and also full statistical accounts similar to those kept by the party of the first part. The accounts so to be kept as above provided shall clearly distinguish between

all business done over, and all moneys received and disbursed or expended, or liabilities incurred in operating that part of the demised railroad extending from Pueblo westward to Cañon City, and over the remainder of said demised railroad, and such account, and any and all accounts which shall or may be kept by the party of the second part, its successors or assigns, in relation to the said demised railroad, or the business thereof, or any part thereof, and vouchers relating thereto, shall at all reasonable times be open to the inspection and examination of the party of the first part, its successors or assigns, its or their duly authorized agent; and the said party of the second part shall, at its own proper cost, furnish monthly statements of the earnings and expenses of the said demised railroad and premises to the party of the first part, and annually, to wit, on or before the first day of April, in each year, during the continuance of this lease, furnish to the said party of the first part, its successors or assigns, a detailed statement, duly authenticated, of the earnings, income and receipts arising from said demised railroad and premises, during the year ending the thirty-first day of December last preceding the said first day of April; and also a detailed statement, similarly authenticated, of all expenditures made by the party of the second part, upon the said demised railroad and premises, for repairs, renewals, replacements, additions, improvements thereto and thereon, and equipment thereof, specifying the purposes of any and all such expenditures, which statement so to be furnished, shall separately state and contain the earnings and income, operating expenses and other expenditures made for or on account of the said portion between Pueblo and Cañon City, and the remainder of the said demised railroad. And the party of the second part shall also, at its own cost, furnish for the use party of the first part, from time to time, whenever necessary, any and all reports and statements which the said party of the first part is now and may be hereafter required to make file under or by virtue of any law enacted by competent authority.

ARTICLE 6. The party of the second part shall and will, at all times during the term aforesaid, bear, pay and discharge, at its own proper cost and expense and without deduction from the rent hereinbefore reserved, any and all expenses, costs, damages, liabilities, claims and demands whatsoever, which shall or may arise out of its possession, management, or operation of the said demised railroad and premises, or any part thereof, or out of the business thereof during the said term, and shall and will, at all times during the said term, hold, save and keep harmless, and indemnify the said party of the first part, of, from, and against any and all expenses of operating during said term the railroad and premises hereby demised, and all damages, liabilities, actions, causes of action, suits, claims and demands for injuries to persons or property, or for causing the death of any person or thing, through accident, neglect or default, during said term, or for breach of contract or wrong done or permitted by the said party of the second part, in the refusal to transport, or negligence in transporting any person, property or thing, or the loss, conversion, or non-delivery of any property which the said party of the second part shall have agreed or be bound to transport over the said demised railroad, or any part thereof, or which the said party of the first part, as the owner of the said railroad hereby demised, or any part thereof, is or shall be under any legal obligation, by contract, public duty or otherwise, to transport thereon, and of, from, and against any and all costs, damages, liabilities, actions, causes of action, suits, claims and demands whatsoever, which shall or may arise out of or in respect to the management, operation or business of the said demised railroad and premises, or any part thereof, by the said party of the second part, during the term aforesaid. And the said party of the second part shall and will defend all suits which may be brought against the party of the first part during the said term, in respect to any matter or thing arising out of the management or operation of the said demised railroad, or any part thereof by the party of the second part, and indemnify and save harmless the party of the first part, of, from, and against any and all matters and things whatsoever, which

might or could be a charge upon, or operate to reduce the rent hereinbefore reserved, arising out of the management of the demised premises by the party of the second part.

ARTICLE 7. Possession of the said demised railroad and premises shall be given by the party of the first part to the party of the second part on the second day of December, in the year eighteen hundred and seventy-eight, and upon the delivery of such possession, the party of the first part shall transfer and deliver to the party of the second part, for use upon said demised railroad and premises, all machinery, tools, implements and furniture, fuel, material and all railroad supplies belonging to the party of the first part, which shall have been procured for the use of said railroad or any part thereof, and shall then remain on hand; *provided, however*, that said fuel, material and other railroad supplies shall at the time of such transfer and delivery be paid for by the party of the second part, in cash, at a price to be agreed upon by two persons, one to be appointed by the president of each party hereto, and in case of their disagreement, by an umpire previously agreed upon by said presidents, whose decision shall be final. Such appraisement shall be made as soon as possible after the execution of these presents, and be evidenced by the certificate of said appraisers, or the umpire, to be made and executed in duplicate, one to be delivered to each of the parties hereto. The appraisers or said umpire shall arrive as nearly as possible at the value of the property as it may be on the day of giving possession of the hereby demised property.

The sum agreed upon by the appraisers, or fixed by the umpire in accordance with the foregoing provisions, shall be deposited by the party of the second part with Sebastian B. Schlesinger as trustee, who shall hold the money deposited with him in trust, and shall at the time of delivery of possession of the demised railroad hereunder to the party of the second part, and upon the surrender by the party of the first part of the certificate aforesaid, pay over to the party of the first part, or any person by it lawfully authorized to receive the same, the sum or price so agreed upon or fixed and

certified; and the party of the first part covenants and agrees that such money shall be applied to the payment of any of its debts, exclusive of stock, in excess of twenty-two thousand six hundred and sixty-four dollars per mile, as aforesaid.

And it is further mutually covenanted and agreed by and between the parties hereto that the party of the first part shall at its own cost receive and collect all earnings incomes, issues and profits of the said demised railroad and premises or any part thereof, and claims and demands arising from the business and operation thereof prior to the said first day of December, 1878; *provided, however*, that if the party of the first part shall so request, such collection and any payments which the party of the first part shall request to be made out of the same, shall be made for the party of the first part by the agents of the party of the second part, so far as may be practicable in the ordinary course of their employment, without charge for the services of such agents.

ARTICLE 8.—And whereas the said party of the first part has heretofore made and entered into certain contracts and agreements in relation to the business of the said demised railroad, including contracts for supplies and material, and for the use and purchase of rolling stock, and it is the intent and meaning of these presents that all contracts relating thereto not hereinafter excepted shall be assumed and carried out by the party of the second part, and that the benefit thereof should inure to and the liability therefor rest on the party of the second part, in place and stead of the party of the first part, now, therefore, the said party of the first part sells, assigns, transfers and sets over unto the party of the second part all the right, title and interest of the party of the first part in and under all such contracts and agreements which shall have been made in relation to the business to be done on the said demised railroad or any part thereof, or in respect to the furnishing of any supplies and material not hereinbefore specifically transferred, and the use and purchase of rolling stock; and the party of the second part hereby assumes the performance of the same on the part and behalf of

the said party of the first part, according to the true intent and meaning thereof; but nothing herein contained shall apply after December 31, 1878, to any traffic contract made by said party of the first part with any connecting railroad companies, unless with a road included in this lease, nor to any other contracts than such as have been made reasonably and in good faith in the course of the business of said party of the first part; and the said party of the second part hereby promises, covenants and agrees to and with the said party of the first part that the said party of the second part shall and will at all times hereafter save and keep harmless and indemnified, the party of the first part, its successors or assigns, of, from and against all costs, damages, expenses, liabilities, claims, and demands whatever, which shall or may arise under said contracts and agreements, or either thereof, by reason of any act or omission of the party of the second part; but the party of the second part is in no event to be liable for supplies or material except such as shall be actually delivered to it under such contracts, nor for rent of rolling stock except such as accrues for use after taking possession, and in no case shall the party of the second part be obliged to assume any contract for the construction of any extension.

ARTICLE 9.—The said party of the first part hereby promises and agrees that as and when the several sums of money hereinbefore provided to be paid for rent under Article 3 shall be paid to and accepted by the party of the first part, the same shall immediately be deposited with the United States Trust or other Trust Company in New York City in trust for the payment of interest on the debts of the party of the first part going to make up the sum of twenty-two thousand six hundred and sixty-four dollars per mile, exclusive of stock, subject to which this lease is made; and if any surplus thereafter remains, such surplus shall be applied first to the payment of such debts and liabilities, other than its present mortgage bonds as are mentioned in the habendum clause of this agreement, going to make up the sum of twenty-two

thousand six hundred and sixty-four dollars per mile, exclusive of stock, subject to which this lease is made, but not including the excess of such debt and liabilities which the party of the first part has hereinbefore agreed to pay or provide for, until such debts and liabilities shall be fully paid and satisfied, and thereafter to the redemption and cancellation of its first mortgage bonds at the lowest market price, to be ascertained by advertising for bids, but at a price not exceeding ten per cent above par; and in case said bonds cannot be purchased at said last-named price, after reasonable advertising, such surplus shall be paid over to the party of the first part to be applied to payment of dividends to its stockholders. The party of the first part also agrees, on or before the first day of February next, to deposit in such Trust Company an amount which with the interest allowed by said Trust Company to May 1, 1879, shall be equal to one-twelfth of the annual interest on its debt of twenty-two thousand six hundred and sixty-four dollars per mile, to be appropriated towards the payment of such interest.

ARTICLE 10.—In case the said party of the second part, its successors or assigns, shall at any time or times hereafter during the term aforesaid fail or omit to pay the rent hereinbefore mentioned or provided to be paid by the party of the second part or any part of such rent when the same shall have become payable as hereinbefore specified; or in case the party of the second part, its successors or assigns, shall fail or omit to fully keep and perform the covenants and agreements herein contained or any of them, and shall continue in default in respect to the payment of such rent or the performance of such covenants and agreements for the period of ninety days, then in either and every such case it shall be lawful for the party of the first part, its successors or assigns, at its or their own option, and without notice to the party of the second part, to enter into and upon the railroad and premises hereinbefore demised and each and every part thereof, and remove all persons therefrom, and from thenceforth the said demised railroad and premises, with the

equipment and appurtenances thereof, and all additions and improvements which shall have been made to the same, except so far as such additions and improvements shall belong to the party of the second part under Article 11, to have, hold, possess and enjoy, as of the first or former estate of the said party of the first part in the said demised premises ; and upon such entry for non-payment of rent or breach or non-performance of any covenant or agreement herein contained to be by the said party of the second part observed or performed, all the estate, right, title, interest, property, possession, claim and demand whatsoever of the party of the second part, its successors or assigns, in and to the said demised railroad and premises, or any part thereof, obtained in, under, or by virtue of this lease, shall wholly and absolutely cease, determine, and become void, anything hereinbefore contained to the contrary thereof in anywise notwithstanding. And in case of such reëntry as aforesaid, the rent hereinbefore provided and the several instalments thereof shall be apportioned from the time for which the last preceding payment of such instalment was made up to the time of such reëntry, and such portion thereof as would have been payable in respect to the intervening time if the whole period in respect to which such instalment was payable had elapsed, shall be deemed and taken to be due and payable, and the said party of the second part shall pay the same. And it is further declared and agreed that such reëntry shall not wave or prejudice any claim or right of the party of the first part to or for damages against the party of the second part on account of such non-payment of rent, or the non-performance or breach of the terms of this lease ; and all such claims and demands and rights thereto are hereby expressly preserved to the party of the first part.

ARTICLE 11.—And the said party of the second part hereby covenants, promises and agrees to and with the said party of the first part, that upon the expiration and at the end of the said term, or other sooner determination of this lease, the said party of the second part shall and will redeliver and

surrender to the party of the first part, its successors or assigns, the said demised railroad and premises in as good order and condition as the same shall be delivered to the party of the second part under this lease, with such additions, betterments and improvements as shall have been made thereto, and also all rolling-stock, equipment and other property delivered under this lease in as good order and condition as its reasonable use and wear, proper repairs and replacements thereof being made from time to time, will permit; or rolling-stock, equipment and other similar property equivalent in character, amount and condition thereto. And it is further mutually agreed that all the rolling-stock, equipment, machinery, tools, implements and furniture, and other similar property, which the party of the first part shall at the time of delivering possession of the said demised railroad and premises, as hereinbefore provided, transfer and deliver to the party of the second part for use upon or in connection with said demised railroad and premises, shall be scheduled and valued, and all rolling-stock, equipment, machinery, tools, implements, furniture, and other similar property which the party of the second part, its successors or assigns, shall, upon the expiration and at the end of said term, or other sooner determination of this lease, redeliver and surrender to the party of the first part, its successors and assigns, shall likewise be scheduled and valued, by two persons, one to be selected by each of the respective parties, its, his or their duly authorized officer or agent; and in case of disagreement of the persons so appointed, by an umpire previously to be selected by said parties or their duly authorized officer or agent, and that the decision of such umpire shall be final; and all rolling-stock, equipment, machinery, tools, implements, furniture and other similar property used upon or in connection with said demised railroad and premises by the party of the second part, in excess of what shall be required by the terms hereof to keep good and replace similar property of the party of the first part, shall belong to the said party of the second part, and said appraisers or said umpire shall have power to make division and apportionment of all such property; and the party

of the first part may at its option purchase of such whatever property shall be alloted to the party of the second part, at a price to be determined by said appraisers or said umpire. And in any such division any equipment acquired by payments of instalments shall belong to the several parties in proportion to the amounts severally paid therefor by each party. It is further agreed, inasmuch as this lease is made upon the understanding that the railroad of the party of the first part shall be on the second day of December, 1878, in thorough running order and condition, that in case the party of the second part shall claim that it is not in such order and condition at that date, the question whether it is so or otherwise, and if otherwise what amount is required to be expended by said party of the second part to put it in such order and condition, shall be determined by appraisers or an umpire to be appointed as above provided; and the amount so determined shall be expended by said party of the second part, and shall be allowed to said party in the adjustment and settlement to be made at the end of the term or the earlier determination thereof.

ARTICLE 12.—The said party of the first part hereby covenants, promises and agrees to and with the said party of the second part, its successors and assigns, that it, the said party of the first part, its successors and assigns, shall and will at any time or times hereafter and whenever thereunto requested by the party of the second part, its successors or assigns, execute, acknowledge and deliver to the said party of the second part, its successors and assigns, at the proper cost and expense of the party of the second part, its successors and assigns, any and all such other and further instruments and assurances in the law for the better demising and leasing of the said railroad and premises to the said party of the second part, its successors and assigns, upon and subject to all and singular the rents, covenants, agreements and conditions hereinbefore reserved and mentioned as by the party of the second part or its successors or assigns, or by its or their counsel learned in the law shall be reasonably advised, de-

vised or required, provided that at the time of such request, the said party of the second part, its successors or assigns, shall not be in default in respect to the payment of any rent or other moneys hereinbefore agreed to be paid by it, or in default in respect to any of the covenants and agreements hereinbefore contained, to be kept and performed on its behalf; and said party of the second part covenants, promises, and agrees to and with the party of the first part, its successors and assigns, that the said party of the second part, its successors and assigns, shall and will at any time or times hereafter and whenever thereto requested by the party of the first part, its successors or assigns, execute, acknowledge, and deliver any and all instruments for the more effectually assuring the payment of the rent hereinbefore reserved or agreed to be paid, and the application of such rent money to and for the purposes herein set forth, and the performance of the promises and agreements hereinbefore set forth on behalf of the party of the second part to be kept and performed, as by the said party of the first part, its successors or assigns, or by its or their counsel learned in the law should be reasonably, advised, devised, and required.

ARTICLE 13.—None of the provisions of this lease shall be abrogated or modified unless with the formal written consent of the trustees of the present mortgages of the party of the first part, or of the holders duly evidenced as such, owning or legally representing not less than two million dollars of the bonds issued thereunder.

IN TESTIMONY WHEREOF, the said corporations, parties hereto, have caused these presents to be signed by their respective presidents thereto duly authorized, and their corporate seals to be hereto affixed, the day and year first above written.

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MEMORANDUM OF AGREEMENT.

D. & R. G. R'y Co. WITH A. T. & S. F. R. R. Co.

THIS MEMORANDUM OF AGREEMENT, Made this nineteenth day of October, 1878.

WITNESSETH:

Whereas, The Denver and Rio Grande Railway Company has made and executed a certain instrument in writing, bearing even date herewith, whereby it undertakes to grant, lease and demise to the Atchison, Topeka and Santa Fé Railroad Company all that certain railway (337 miles more or less, exclusive of sidings), and other property, therein more particularly described, in consideration of a certain rent therein reserved, and certain covenants, promises and agreements therein contained, by the Atchison, Topeka and Santa Fé Railroad Company, to be paid, kept and performed as thereby, reference being thereunto had will more fully appear; and the said Denver and Rio Grande Railway Company thereby agrees to pay or provide for all its debts incurred up to the time of delivery of possession thereunder, in excess of Twenty-two

Thousand Six Hundred and Sixty-four Dollars per mile: and the said Atchison, Topeka and Santa Fé Railroad Company has agreed to and accepted the terms of such lease in form and in substance, and in evidence thereof has likewise executed a counterpart of said instrument; and whereas, it is in and by said instrument provided that possession of the demised railway property should be surrendered and delivered by the said lessor Company to the said lessee Company, and the term thereby granted is to commence on the second day of December, Eighteen Hundred and Seventy-eight.

NOW THIS MEMORANDUM WITNESSETH that the parties to said instruments or leases have agreed that the same so executed shall be deposited with S. B. Schlesinger, of Boston, in escrow pending the performance, by the several parties hereinafter named, or the acts to be done and performed by them respectively.

Whereas, It is necessary and advisable, in order to make such lease binding and effectual, that the same, and the terms thereof, should be ratified and confirmed by the stockholders of the lessor Company and the directors of lessee Company, parties thereto:

1. Pending the ratification thereof by the stockholders and directors of said Companies respectively:

And whereas, in and by said lease the said Atchison, Topeka and and Santa Fe Railroad Company has agreed to pay in cash for the fuel, material and supplies on hand at the time of delivery of possession of the demised property to it at a price to be determined, as in said lease provided, and it is intended that the money so to be paid is to be applied towards paying or providing for the said debt of the lessor Company, in excess of the amount of Twenty two Thousand Six Hundred and Sixty-four Dollars per mile, aforesaid.

2. Pending the deposit by the Atchison, Topeka and Santa Fe Railroad Company with S. B. Schlesinger, as Trustee of the money so to be paid by it.

And whereas, it is also intended as a part of the entire plan that the capital stock of the Denver and Rio Grande

Railway Company, consisting of eighty-five thousand shares of one hundred dollars each, shall to the extent practicable be controlled in the interest of the Pueblo and Arkansas Valley Railroad Company, and to that end William J. Palmer and Alden Speare have agreed substantially, as follows:

That said William J. Palmer shall on or before the first day of December, eighteen hundred and seventy-eight, deposit forty-two thousand five hundred and ten shares of the capital stock of the Denver and Rio Grande Railway Company with T. Jefferson Coolidge, as Trustee, and that said Alden Speare shall likewise on or before that day deposit with said Trustee eight thousand five hundred and two shares of one hundred dollars each in full paid stock of the Pueblo and Arkansas Valley Railroad Company.

3. Pending the deposit of said shares by said parties respectively,

On the second day of December, 1878, if by that time

I. Said lease shall have been ratified as aforesaid,

II. And the Atchison, Topeka and Santa Fe Railroad Company shall have deposited said monies:

III. And the said William J. Palmer and Alden Speare shall respectively have deposited said shares, the said S. B. Schlesinger, Trustee, shall deliver to each of said Companies the instrument executed by the other under such other Company's seal, but if prior to said second day of December, 1878, the said lease shall not have been ratified by the stockholders of the lessor Company, and the directors of the lessee Company, or either of them, or the said Atchison, Topeka and Santa Fe Railroad Company shall not have deposited the said money, or the said William J. Palmer and Alden Speare, or either of them, shall not respectively have deposited the said shares, then the said S. B Schlesinger shall continue to hold the said instruments in escrow, pending the performance by the party or parties in default of the act or thing by such party or parties, respectively, required to be performed, and thereupon, immediately after the party or parties in default

shall have done and performed the act of such party or parties respectively required, the said S. B. Schlesinger shall deliver such instruments as aforesaid, and when delivered in accordance herewith the said instruments shall thereupon immediately become and be of full force and effect from and after such delivery ; but at the time said Trustee shall deliver said instruments he shall likewise pay over to the Denver and Rio Grande Railway Company, or any person by it authorized to receive the same, the money which the said Atchison, Topeka and Santa Fe Railroad Company shall have deposited with him as the price or value of the fuel, material and railroad supplies on hand at the time of such delivery, to be applied to the reduction of the debts of the Denver and Rio Grahde Railway Company in excess of twenty-two thousand six hundred and sixty-four dollars per mile, it being the true intent and meaning of these presents that ratification by the stockholders of the Denver and Rio Grande Railway Company and by the directors of the Atchison, Topeka and Santa Fe Railroad Company of the lease as aforesaid, the deposit of the money by the said Atchison, Topeka and Santa Fe Railroad Company, the deposit of said shares by William J. Palmer and Alden Speare, respectively, are all parts of one transaction, and that the lease shall have no validity unless the parties named shall severally do and perform their respective parts, but that sufficient time shall be afforded them to do so.

DENVER AND RIO GRANDE R'Y CO.,
By WM. J. PALMER.

ATCHISON, TOPEKA AND SANTA FE R. R. CO.,
By THOS. NICKERSON.

Signed in the presence of
THEODORE F. H. MEYER.

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MEMORANDUM OF AGREEMENT.

PALMER-SPEARE AGREEMENT.

THIS AGREEMENT, Made and entered into this nineteenth day of October, 1878, witnesseth that William J. Palmer, of Colorado, party of the first part, and Alden Speare, of Boston, Massachusetts, party of the second part, in consideration of the mutual covenants and agreements hereinafter contained, have agreed and hereby do agree as follows:

I. On or before the first day of December, 1878, there shall be deposited with T. Jefferson Coolidge, Esquire, also of Boston, as trustee hereunder, by the party of the first part or on his behalf, Forty-two thousand five hundred and ten shares of one hundred dollars each, in the non-assessable capital stock of the Denver and Rio Grande Railway Company, being a majority of said stock; and within ten days after the party of the first part shall have deposited in the postoffice at the City of New York, properly enveloped and addressed to the party of the second part at Boston, Mass., with the postage prepaid thereon, a notice in writing, there shall likewise be deposited with said trustee by the party of the second part, or on his behalf, Eight thousand five hundred and two shares of one hundred dollars each, in the non-assessable capital stock of the Pueblo and Arkansas Valley Railroad Company,

being at the rate of one share in the said stock of the last-named company for each five shares of the said stock of the Denver and Rio Grande Railway Company so deposited by the said party of the first part. If either party fail, this agreement to be void, and the party not in default shall be entitled upon demand to the redelivery to him of the shares he shall have deposited as aforesaid in conformity hereto. But if neither party shall fail, then the said trustee shall have and hold said shares so deposited with him by the said parties respectively in trust and dispose thereof as hereinafter provided.

The said trustee shall hand over and deliver to said party of the first part for each five shares in the capital stock of the Denver and Rio Grande Railway Company so deposited, one share in the said stock of the Pueblo and Arkansas Valley Railroad Company, to have and to hold the same as his, the party of the first part's, property, free and discharged of and from all claims and demands of the said party of the second part or any other person or persons, party or parties, whomsoever, thereon or thereto, or on or to any part thereof; *provided, however*, that until the said party of the first part shall furnish proof satisfactory to said trustee that all debts, including any liabilities of the said Denver and Rio Grande Railway Company for damages to persons or property carried or injured, or for salaries, or for non-fulfillment of contracts, up to the period of the delivery by the Denver and Rio Grande Railway Company of certain property described in a certain lease of the Denver and Rio Grande Railway Company, bearing even date herewith, to the Atchison, Topeka and Santa Fé Railroad Company, or incurred under the administration of the said Denver and Rio Grande Railway Company prior to such delivery, and which hereafter become debts in excess of the sum of twenty-two thousand six hundred and sixty-four dollars per mile of its constructed road, shall have been either paid, or payment thereof secured in a manner to be approved by said trustee, the said trustee shall retain from the said shares of the Pueblo and Arkansas Valley Railroad Company

stock, which would otherwise be deliverable to the party of the first part hereunder, not exceeding five thousand shares; but as and when the said debt shall be paid or payment thereof secured in a manner to be approved by said trustee, the trustee shall hand over and deliver to the party of the first part as many of the said five thousand shares of the Pueblo and Arkansas Valley Railroad Company's stock so retained as may be reasonably proportionate to the amount of such debt so paid or secured; and upon being satisfied that all said debts of said Denver and Rio Grande Railway Company shall have been paid, or payment thereof secured in a manner satisfactory to him, said trustee shall hand over and deliver to the party of the first part the remainder of the said five thousand shares of the Pueblo and Arkansas Valley Railroad Company's stock retained as aforesaid.

II. Whenever, within one year from the date on which the Denver and Rio Grande Railway Company shall deliver possession under said lease to the Atchison, Topeka and Santa Fe Railroad Company, the said party of the first part shall offer to deposit with said trustee a further number of additional shares of the stock of the Denver and Rio Grande Railway Company, then the party of the second part shall and will from time to time, and as required, deposit with said trustee such additional or further amount of said shares in the capital stock of the said Pueblo and Arkansas Valley Railroad Company as he may deem proper, not, however, less than sufficient to deliver to the party of the first part, one share in the said Pueblo and Arkansas Valley Railroad Company's stock for every five shares in the said Denver and Rio Grande Railway Company's stock so offered by the party of the first part, which stock, so to be deposited by the party of the second part, shall by said trustee be delivered to the party of the first part, whenever he shall deposit with said trustee any such further or additional shares in the capital stock of said Denver and Rio Grande Railway Company, at the rate of one share of the stock of the said Pueblo and Arkansas Valley Railroad Company for each five shares of the stock of

said Denver and Rio Grande Railway Company, until all the stock of the said last named company, now amounting to eight million five hundred thousand dollars. par value, or eighty-five thousand shares (inclusive of the shares to be deposited under paragraph I.) shall have been deposited by the party of the first part; provided, however, that if the party of the first part shall at or before the expiration of said year, have deposited, or offered to deposit with said trustee, sixty-three thousand, seven hundred and fifty shares of said stock of the Denver and Rio Grande Railway Company, the period of one year hereinbefore limited shall at the option of the party of the first part by notice in writing, to be delivered to said trustee, be extended for a period not exceeding one additional year.

The said trustee shall have and hold the legal title to all the Denver and Rio Grande Railway Company's stock deposited with him by the party of the first part, and shall vote upon the said stock as directed by the party of the second part.

WHEREAS, The Denver and Rio Grande Railway Company has made and executed a certain instrument in writing, bearing even date herewith, whereby it undertakes to grant, lease and demise its constructed road to the Atchison, Topeka and Santa Fe Railroad Company; and whereas such lease and this agreement are parts of the plan whereby the constructed railroad of the Denver and Rio Grande Railway Company, and its stock should be controlled in the interest of the Atchison, Topeka and Santa Fe Railroad Company and corporations, whose roads are leased or otherwise, controlled by it, and the present stockholders of the said Denver and Rio Grande Railway Company or their assigns receive full paid non-assessable stock of the Pueblo and Arkansas Valley Railroad Company in lieu of and on surrendering the shares of the Denver and Rio Grande Railway Company's stock, held by him, or them respectively, at the rate aforesaid, which rate is based on the assumption that the indebtedness of said companies respectively, exclusive of stock, does not

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exceed a certain sum per mile of constructed road, and the said Denver and Rio Grande Railway Company has guaranteed to pay or secure the payment of its debts in excess of ($22,664) twenty-two thousand six hundred and sixty-four dollars per mile exclusive of the stock in furtherance of the plan :

Now, for the purpose of enabling said William J. Palmer to collect from each holder of the Denver and Rio Grande Railway Company's stock, a proportionate share of said excess, the party of the second part further covenants and agrees, that the entire interchange of stocks shall be made by the parties hereto, and through the intervention of said trustee and as herein provided and not otherwise; however, provided that nothing herein contained, shall be deemed to authorize the party of the first part by pursuing the remedies herein provided or other remedies to compel such interchange after the period of one year, or if such period be extended as aforesaid, after the expiration of such extension.

It is further agreed, that whatever assets the said Denver and Rio Grande Railway Company may have outside of said demised railroad and premises at the time of surrendering possession thereof, to the Atchison, Topeka and Santa Fe Railroad Company or accruing to it afterwards on account of the administration of its business before such date shall be well and truly applied toward the payment of such debts of said company (in excess of the said sum of twenty-two thousand, six hundred and sixty-four dollars per mile) as the party of the first part may direct, and in such manner as he may direct, and that the trustee hereunder or the person to whom the trustee may hereafter transfer and assign the stock which shall be deposited with him by said party of the first part, shall at all times and whenever requested aid and assist with his or their vote on such stock or otherwise, howsoever, in carrying out this provision.

It is further agreed, that inasmuch as part of the debt of the Denver and Rio Grande Railway Company in excess of $22,664 per mile, has been incurred for work done and mate-

rial expended for extending its lines, that such work done and material expended forms part of the assets aforesaid, and that whenever any such work or materials shall be used or taken possession of or otherwise accrue to the benefit of the Atchison, Topeka and Santa Fe Railroad Company or the Pueblo and Arkansas Valley Railroad Company, or any corporation whose road is or shall be leased or controlled by it the Atchison, Topeka and Santa Fe Railroad Company, the value of such work and material so used and taken possession of or otherwise accruing to the benefit of the Atchison, Topeka aad Santa Fe Railroad or other corporation as aforesaid, shall be appraised by two persons, one to be appointed by the President of the Atchison, Topeka and Santa Fe Railroad Company, and the other by the party of the first part, or in case such persons shall disagree, by an umpire to be appointed by the said President and the party of the first part, and the decision of such umpire shall be final; and the party of the second part promises and agrees on demand to pay to the party of the first part the amount or amounts so agreed upon or fixed by said umpire, and that failing to pay the same on such demand, such amount or amounts shall be held to reduce the debt of the Denver and Rio Grande Railway Company in excess of $22,664 per mile *protanto*, and the Trustee hereunder shall deliver to the party of the first part a proportionate number of the five thousand shares in the Pueblo and Arkansas Valley Railroad Company's stock, which he shall have retained as aforesaid; but the party of the first part, covenants that on receiving such amount or amouuts from the party of the second part, he shall and will well and truly apply the same to the reduction of the said debt in excess of $22,664 per mile.

It is further agreed, inasmuch as the debts of the Denver and Rio Grande Railway in excess of $22,664 per mile include any liabilities of the Denver and Rio Grande Railway Company for damages to person or property carried, or salaries, or non-fulfilment of contracts up to the period of the delivery of the leased property to the Atchison, Topeka and Santa Fe

Railroad Company, or incurred under the administration of the company prior to such delivery, and which hereafter shall become debts, that the party of the first part shall have the right, full power and authority to defend in the name of the Denver and Rio Grande Railway Company, but at his own proper cost and expense any suit, action, or other legal proceeding, which shall or may be brought or be pending to enforce such liability, and that if the power and authority hereby granted shall be insufficient, the Board of Directors or other duly authorized officer of said company for the time being, shall, on the written request of the party of the first part grant and confer such power and authority on the party of the first part without any delay or condition imposed.

It is understood that this agreement is to bind the party of the second part as the legal holder of the Pueblo and Arkansas Valley Railroad Company's stock hereinbefore referred to and as the representative of all persons or parties having or lawfully claiming to have a beneficial interest in such stock, that any liability however arising from the breach of any covenant or the non-performance of any act on behalf of the party of the second part may be enforced against him individually, and in case said party of the second part shall die, or become incapable by disease to perform his part of the agreement, its provisions shall be carried out by Isaac T. Burr; that in case the party of the first part shall die, or become incapable to act, the rights and privileges to him herein granted, and obligations to be performed by him, shall be exercised by William A. Bell, of Colorado. In case of any failure on the part of the party of the second part to deliver to said trustee, the Pueblo and Arkansas Valley Railroad Company's stock, or any part thereof (over and above eight thousand five hundred and two shares) when, as provided in this agreement, the said trustee shall, if he then holds any Denver and Rio Grande Railway Company's stock, and otherwise the said party of the second part shall transfer and deliver to the party of the first part, ten shares of Denver and Rio Grande Railway Company's stock as penalty for each share of Pueblo and Arkansas Valley stock he may fail to so

deliver, and there shall be the same penalty for each share of Pueblo and Arkansas Valley Railroad Company's stock that may be exchanged for stock of the Denver and Rio Grande Railway Company by the Pueblo and Arkansas Valley Railroad Company, or by the Atchison, Topeka and Santa Fe Railroad Company, or by any party or company, directly or indirectly, acting for them or either of them, during the periods herein provided, except the same shall be made by the parties hereto through the trustee.

The party of the second part covenants not to part with any of the Denver and Rio Grande Railway Company's stock delivered to him under this agreement until December 2d, 1879, or if the time be extended as provided herein, until December 2d, 1880.

Provided, That nothing herein contained shall be held to prevent the delivery to the party of the first part of an shares of said stock provided to be delivered to him as penalty.

And the said party of the second part covenants and guarantees that the debt of the Pueblo and Arkansas Valley Railroad Company does not exceed, exclusive of stock, eleven thousand seven hundred and eighty dollars per mile, and in case the total debt of that Company shall exceed that sum, the party of the second part promises and agrees that he shall and will deposit with said trustee so many shares of non-assessable stock of the last named Company in addition to the shares hereinbefore agreed to be deposited by him, as shall enable the trustee to deliver to the party of the first part on account of stock then already deposited by him, or which he may hereafter deposit, an additional amount of said Pueblo and Arkansas Valley Railroad Company's stock for each five shares the party of the first part shall then have deposited or thereafter deposit in the same proportion as the excess may bear to the amount of debt aforesaid, and if default be made in such deposit or delivery, the party of the first part shall have the right to demand from said trustee and of the party of the second part the return of a proportionate

number of shares of the Denver and Rio Grande Railway Company's stock, which upon such demand shall be delivered to him by the trustee or the party of the second part, as the case may be.

It is further agreed that in case any disputes shall arise between the parties hereto, the said trustee shall act as umpire; but if a dispute or difference arises between the parties or either of them and the said trustee, the party who shall claim his rights to be affected by such dispute and the trustee shall each appoint a referee, and the referees so appointed shall select another person who shall act as umpire, and the decision of any umpire appointed hereunder shall be final, and the parties and said trustee shall be bound to conform their action, respectively to such decision

It is further understood that "debts of the Denver and Rio Grande Railway Company in excess of twenty-two thousand six hundred and sixty-four dollars per mile," are exclusive of its stock.

(SIGNED) WM. J. PALMER,
(SIGNED) ALDEN SPEARE,

Signed, Sealed and Delivered in the presence of
THEODORE F. H. MEYER.

G.

BOSTON, December 13th, 1879.

Thomas Nickerson, Esquire, President Atchison, Topeka and Santa Fe R. R.

DEAR SIR:—

I have received telegrams from General Palmer authorizing me to say that without regard to the stipulations in the escrow agreement in the hands of Mr. Schlesinger, he is ready to deliver at once possession of the Denver and R. G. R. R. upon the following terms and conditions:

First—You are at once to telegraph to Mr. Strong and Mr. Spencer, the umpire, that the appraisal of supplies, material, etc., is to proceed with all the dispatch that Mr. Spencer thinks possible, and are also to deposit with Mr. Schlesinger the sum of $150,000 to secure payment for material, supplies, etc., delivered.

Second—Gen. Palmer on being telegraphed to that these two things have been done is to deliver to you immediate possession of the D. & R. G. R. R., and complete the transfer to Mr. Coolidge of the D. & R. G. R. R. stock as provided for in the agreement with Mr. Speare, and on receipt by Mr. Coolidge, Mr. Schlesinger and yourself of telegrams from Gen. Palmer, Mr. Strong and Mr. Jackson that the Rail Road has been delivered and the stock transferred, Mr. Schlesinger shall at once pay to Gen. Palmer or his order the sum of $75,000 on account of such supplies and materials, and shall also directly he is informed by Mr. Spencer by telegraph of the total amount of the appraisal, pay at once to Gen. Palmer the balance found due the D. & R. G. R. R. without any rebate or offset or counter claim on the part of the A., T. & S. F. R. R., and return the remainder in his hands if there is any to your company.

Third—All the stipulations in the lease as to the delivery of possession, the right to earnings, etc., shall read as if the date named therein were the 13th and not the 2nd day of December, and the D. & R. G. R. R. shall deposit on the 1st of Feb-

ruary, 1879, the proportion of interest on their bonds to December 13th, 78, instead of to Decbr. 1st, 1878. (one-twelfth) as provided in the last clause of Article 9. of the lease. But in all other respects, the lease shall be unaffected.

Upon learning by letter from you that your company accepts this proposal, I will at once telegraph Gen. Palmer that the matter is concluded and he will be prepared to deliver the road to-day.

Yours Respectfully,

C. F. WOERISHOFFER.

H.

OFFICE OF THE
ATCHISON, TOPEKA AND SANTA FE RAILROAD CO.,
Boston, December 13, 1878.

C. F. Woerishoffer, Esquire.

DEAR SIR:—

Your letter of this date is received and contents are fully noted. I accept your offer with the following qualifications, viz:—

I will make a special deposit with Mr. S. B. Schlesinger of $75,000 and one executed copy of the lease, with the proviso that if the railroad is not delivered on or before the 14th inst,, he shall return the $75,000 and the lease to me on demand, but if the road is so delivered, then the $75,000 shall be held as payment on account of supplies, under clause seven of lease, and may be paid at once to W. J. Palmer, President, to be applied by him as provided under clause seven of said lease.

The executed lease is also to be held under the escrow agreement. I will also make the further special deposit of $75,000, which shall be held to pay for any balance that may be due for supplies under clause seven of lease.

Yours Truly,

(SIGNED.) THOMAS NICKERSON,
Pres't.

Boston, December 13, 1878.

C. F. Woerishoffer, Esq.,

DEAR SIR:—

I have this day telegraphed to Wm. B. Strong at Colorado Springs the following: "Hasten appraisal of supplies under clause seven of lease as fast as possible. When road is delivered you under lease, telegraph me at once and repeat dispatch."

Yours Truly,

(SIGNED.) THOMAS NICKERSON.

Pres't.

IX.

February 15th, 1879

Thomas Nickerson, Esquire,
President Atchison, Topeka and Santa Fe R. Rd.:

DEAR SIR:—

I have your letter of Feb. 10th with regard to the Atchison and Denver Railroads Companies and the agreements between them. No one can regret more than I do, the present difference between Gen'l Palmer and yourself as to this matter. The present agreements however, were made by himself and yourself personally, and have entirely superseded that signed by Col. Potts and myself in behalf of the Denver R. Rd. Co. Without discussing your letter in detail, and not meaning thereby either to admit or to question the correctness of your narrative, but simply passing it by, I wish in justice to Gen'l. Palmer to say a word on one point.

The lease of the Denver and Rio Grande R. Rd. Co. conveys only "the railroad heretofore constructed and operated by that Company" and describes it. It distinctly promises that "all rights and privileges other than these "(specified) were expressly reserved and exempted." I understood at the time that this agreement was made, that this reserved and exempted from the lease the rights to make any and all extensions and new railroads, including that through the Cañon, which the Denver Company might have; and the language which I have quoted seems to me apt and

explicit for this purpose. The agreement fixes the debt of the Denver Road at $22,664 per mile, but recognizes an existing debt in excess of this amount to be provided for by that company and which the exempted rights and franchises —for they had no other exempted property—furnished the principal, if not the only means to provide for—if these franchises were of any value.

I cannot undertake to state what Gen'l Palmer said to you in conversation, but I do know, that he stated to me and to his counsel that he must reserve the rights and franchises enumerated above and gave the reasons (already stated) for this reservation ; and I am quite confident that enough on this point was stated in presence of *your* counsel, to indicate Gen'l Palmer's purpose in this regard. But without this, and assuming that he said nothing but what is in the lease and which I have quoted ; these clauses, which he did cause to be inserted, and which he insisted on, seem to me to declare his purpose, to state what he leased and what he kept, with unmistakable clearness.

If I had any thought about it at the time, it was that *he* regarded the franchises he retained as valuable and *you* thought them substantially worthless ; and it seems to me that while he holds them now with tenacity, as he has a right to under the lease, as I read it ; your view as to their value has been materially modified.

What he is doing in the matter, however, is his own action and not mine. The responsibility and the credit are both with him, and while I regret the difference, I can do nothing in the premises but put before you, as I have endeavored very briefly to do, a statement of what seems to me Gen. Palmer's position and rights under the agreement between your respective roads. I shall transmit a copy of this letter to Col. Potts and request him to express his views, if he has any to give, to you direct.

Very truly, yours,

(SIGNED) SEBASTIAN B. SCHLESINGER.

SUPREME COURT OF THE UNITED STATES

Of the October Term, 1878.

THE DENVER AND RIO GRANDE RAILWAY COMPANY,
vs. *Appellant,*
EBENEZER T. ALLING, et al.,
Respondents.
} No. 811.

THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY,
vs. *Respondent,*
THE DENVER AND RIO GRANDE RAILWAY COMPANY,
Appellant.
} No. 812.

UNITED STATES OF AMERICA,
STATE AND DISTRICT OF COLORADO,
EL PASO COUNTY,
} ss.

I, Wm. J. Palmer, having first been duly sworn, say on oath:

The Denver and Grande Railway company has executed a certain deed of trust bearing date November 1st, 1878, whereby in order to secure the payment of its certain debts and liabilities usually comprehended under the term or designation of floating debts or liabilities, incurred in the regular course of its business, and to protect and secure in manner therein provided its several creditors holding just debts, claims and de-

mands against it of the description aforesaid not otherwise secured, to an amount not exceeding $716,000, and for other good consideration, it granted and conveyed to Wm. A. Bell, of Manitou, El Paso county, Colorado, certain property, including its railway in process of construction from a point on the Arkansas River at or near Cañon City westward up the valley of the Arkansas through the big Cañon of the same, the right of way thereunto belonging which said railway company then had or might thereafter become entitled to under and by virtue of certain acts of congress, respectively approved June 8th, 1872, March 3rd, 1875, and March 3rd, 1877, in trust for the benefit of all the persons and parties, corporate bodies and partnership firms holding just debts, claims and demands against said company of the description aforesaid, that among the covenants in said trust deed contained, is the following, to wit :

And Whereas, the right to construct the Railway through the Big Cañon of the Arkansas River on the line located by the said Railway company is at present the subject of litigation, and an action is now pending in the Circuit Court of the United States for the District of Colorado, between said Railway company and the Pueblo and Arkansas Valley Railroad company, and an appeal has been taken from the decrees made by said Circuit Court in a controversy between said Railway company and an organization styling itself the Cañon City and San Juan Railway company which appeal is now pending in the Supreme Court of the United States, and the decision is soon expected.

The said Railway company further covenants and agrees that it shall not and will not do or cause to be done any act or thing whatsoever whereby an adjudication and final determination of the controversy of the rights of the respective litigants might be hindered, delayed or prevented.

Said mortgage was duly authorized by the Board of Directors of said company and on November 5, 1878, approved in form and substance and the same as approved was duly executed and delivered.

And the stockholders of said company at a meeting held pursuant to adjournment, on November 30, 1878, 70,977¾ shares being represented in person or by proxy, ratified and confirmed said mortgage and the action of the directors in respect thereto and the execution thereof. And the said trust deed is, and remains in full force and effect in all its parts.

WM. J. PALMER.

Subscribed and sworn
to before me this 10th
day of March, A. D. 1879.

ERNEST P. STEPHENSON,
Notary Public, El Paso Co.

SUPREME COURT OF THE UNITED STATES

Of the October Term, 1878.

THE DENVER AND RIO GRANDE RAILWAY COMPANY, *Appellant*, *vs.* EBENEZER T. ALLING, et al., *Respondents.* — No. 811.

THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY, *Respondent*, *vs.* THE DENVER AND RIO GRANDE RAILWAY COMPANY, *Appellant.* — No. 812.

UNITED STATES OF AMERICA, STATE AND DISTRICT OF COLORADO, EL PASO COUNTY, } ss.

William J. Palmer having first been duly sworn, says:

I have, since March 10th, received reliable information, which I verily believe to be true, that the motions herein to dismiss the appeals to this Court from the decrees of the Circuit Court of the United States, for the District Court of Colorado, entered on August 24, 1878, in the causes wherein this affidavit is entitled, is made for delay. That it is the aim of the counsel of the Atchison, Topeka and Santa Fe, the Pueblo and Arkansas Valley Railroad Companies, and the Cañon

SUPREME COURT OF THE UNITED STATES

Of the October Term, 1878.

THE DENVER AND RIO GRANDE RAILWAY COMPANY, *Appellant*, *vs.* EBENEZER T. ALLING, et al., *Respondents.* } No. 811.

THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY, *Respondent*, *vs.* THE DENVER AND RIO GRANDE RAILWAY COMPANY, *Appellant.* } No. 812.

UNITED STATES OF AMERICA, STATE AND DISTRICT OF COLORADO, EL PASO COUNTY, } ss.

William J. Palmer having first been duly sworn, says:

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City and San Juan Railway Company, to delay the final decision on these appeals and that such counsel have expressed their confidence in procuring long delays, and preventing a final decision of this Court for a long period.

I further say that the Denver and Rio Grande Railway Company is now, by said decrees, enjoined from building through the Grand Cañon of the Arkansas, and from completing its Leadville extension, and delays are prejudicial to the interests of the Denver and Rio Grande Railway Company, its creditors and stockholders. The passenger traffic and tonnage of freights now transported by wagon from and to Leadville is very large and daily increasing, and the freight moneys earned daily amount to nearly $3,000.

The debts of this Company, for the payment whereof the Company relies on the assets involved in the appeals are pressing, and every day's delay in the completion of the Railway involves a serious loss. Two other lines are pushing forward construction from different points to reach Leadville, and delay in the final decision will involve irreparable injury to the Denver and Rio Grande Railway Company, its creditors and stockholders.

WM. J. PALMER.

Subscribed and sworn
to before me this 10th
day of March, A. D. 1879.

ERNEST P. STEPHENSON,
Notary Public, El Paso Co.

SUPREME COURT OF THE UNITED STATES.

Of the October Term, 1878.

THE DENVER AND RIO GRANDE RAILWAY COMPANY, *Appellant,*
vs.
EBENEZER T. ALLING, et al., *Respondents.*
No. 811.

THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY, *Respondent,*
vs.
THE DENVER AND RIO GRANDE RAILWAY COMPANY, *Appellant.*
No. 812.

UNITED STATES OF AMERICA,
STATE AND DISTRICT OF COLORADO. } ss.
EL PASO COUNTY.

I, William J. Palmer, having first been duly sworn do on oath depose and say:

On Monday, March 10th, 1879, I received a letter of which the following is a copy:

BOSTON, March 5th, 1879.

William J. Palmer, Esquire,
Colorado Springs, Colo.

DEAR SIR:—

Your favor of 28th inst. and accompanying affidavit are received, and have been submitted to counsel.

Very Truly Yours,
T. JEFFERSON COOLIDGE
BY C. S. TUCKERMAN.

The letter and affidavit therein referred to are the letter and affidavits mentioned in my affidavit of March 10, 1879, pages 31-36. Alden Speare has not acknowledged receipt, and neither said Speare nor said Coolidge have done as by my said letter of February 28th requested and I have not received their said affidavits subscribed and verified by them respectively, and am unable to file the same in this court and use the same on the hearing of these motions.

Subscribed and sworn
to before me this 13th
day of March, 1879.

WM. J. PALMER.

ERNEST P. STEPHENSON,

Notary Public, El Paso Co.

In the Supreme Court of the United States.

OF THE OCTOBER TERM, 1875.

The Denver and Rio Grande Railway Company,
Appellant,
vs.
Ebenezer T. Alling, et al,
Appellees.
NO. 811.

The Canon City and San Juan Railway Company,
Appellee,
vs.
The Denver and Rio Grande Railway Company,
Appellant.
NO. 812.

MOTION TO DISMISS APPEALS.

BRIEF FOR APPELLEES.

CHAS. E. GAST, Solicitor.

In the Supreme Court of the United States.

OF THE OCTOBER TERM, 1879.

The Denver and Rio Grande Railway Company, *Appellant*,
vs.
Ebenezer T. Alling, et al, *Appellees.*
NO. 811.

The Canon City and San Juan Railway Company, *Appellee*,
vs.
The Denver and Rio Grande Railway Company, *Appellant.*
NO. 812.

MOTION TO DISMISS APPEALS.

BRIEF FOR APPELLEES.

CHAS. E. GAST, Solicitor.

IN THE SUPREME COURT

OF THE UNITED STATES.

OF THE OCTOBER TERM, 1878.

THE DENVER AND RIO GRANDE RAILWAY COMPANY, *Appellant.*
vs.
EBENEZER T. ALLING, ET AL., *Appellees.*
No. 811.

THE CANON CITY AND SAN JUAN RAILWAY COMPANY, *Appellee.*
vs.
THE DENVER AND RIO GRANDE RAILWAY COMPANY, *Appellant.*
No. 812.

Motion to Dismiss Appeals.

BRIEF FOR APPELLEES.

The above entitled causes involved, originally, matters in controversy growing out of the competitive and rival construction of two railroads through the Grand Canon of the Arkansas river, in Colorado.

The Court will find from an examination of the record, if such becomes necessary, that on the 19th day of April, 1878, the Canon City and San Juan Railway Company, (the legal name of which corporation is now the Pueblo and Arkansas Valley Railroad Company,) and the Denver and Rio Grande Railway Company, took simultaneous possession of the Grand Canon for the purpose of building a line of railroad through the Canon to the town of Leadville. It is charged by the appellee that the occupation of the Canon by the Denver and Rio Grande Company was in bad faith, and not for the purpose of building a railroad; but solely to embarrass, hinder and delay the operations of the Canon City and San Juan Company. However, for the purpose

of this motion, we may concede that the intention of the Denver and Rio Grande Company at that time was to construct the line of railroad, as claimed by its bill. This rival construction at once gave rise to right of way difficulties. It was urged by the appellant that the Act of June 8th, 1872, (17 Stat. 339) granting right of way to the Denver and Rio Grande Company over the public lands to the extent of one hundred feet on each side of the center of its track, gave the company an exclusive right to occupy the Canon, by reason of the physical fact that the Canon is in most places less than two hundred feet in width. The Canon City and San Juan Company claimed right of way by virtue of the approval of its plat by the Secretary of the Interior under the Act of March 3d, 1875, (Stats. of 1874-5, page 482). These suits were accordingly instituted for the purpose of having a judicial determination of the rights of the two companies. They embodied at that time a *real* controversy, and were carefully considered by the circuit court, as their importance demanded.

Appeals were prosecuted to this court, and a stipulation filed to submit the causes upon printed arguments under the rule. The purpose of this stipulation, of course, was to have an early adjudication by this court of the questions involved; and the same was in a manner exacted by his Honor, Judge Dillon, as a condition to advancing the causes in the circuit court, by permitting the testimony to be taken in open court.

So much of the record, we presume, it is necessary to understand as preliminary to the motion.

While the appeals were pending in this court, and after the stipulation to submit the causes was filed, arrangements were perfected between the two companies litigant, which in our view renders the decision of the appeals clearly unnecessary, and in fact improper. By this we mean, that in the light of the subsequent negotiations between the companies, the questions involved have become purely *theoretical*; and furthermore that the prosecution of the appeals at this time is, if not in bad faith toward the court, highly inequitable toward us, and in violation of the letter and spirit of existing agreements between the two companies.

We take it as granted that this court will not undertake to decide controversies which are such only *in form*, the plaintiff and defendant having in fact the same interest. As was remarked by

Taney, C. J., in Lord *vs.* Veazie, (8 Howard 254) "it is the office of courts of justice to decide the rights of persons and of property, when the persons interested cannot adjust them by agreement between themselves."

If it is made to appear to the court by affidavit or otherwise, that the subject matter of the litigation has ceased to be an actual matter of contention, or that compromises have been made which good faith and equity demand shall be enforced as such, to the discontinuance of further proceedings, the court will act upon motion of this character, as was done in Lord *vs.* Veazie, *supra*.

When it was stipulated to submit these causes, the two companies were engaged in rival construction over the same territory. Litigation had grown therefrom. These competitive ventures in railroad building, as is usually the case in sparsely settled countries, threatened to be disastrous to both companies. They certainly would have ruined the one, and might, perhaps, have seriously crippled the other. Accordingly, having commendably in view the real interests of both companies, the friends and owners of both began to consider whether some means could not be devised to adjust their differences. It is part of the history of this compromise, as shown by the circular of President Palmer to the stockholders of the Denver and Rio Grande Company, that a plan of actual *consolidation* was first agreed upon, whereby the capital stocks and franchises of both companies would have become merged and blended into a new consolidated organization. Counsel advised, however, that such consolidation might not be sustained because of constitutional obstacles; and it became necessary to accomplish as nearly the same result by other means, as could legally be effected.

The plan adopted consisted in a lease of the Denver and Rio Grande Railroad to the Atchison, Topeka and Santa Fe Company for the period of thirty years, and an interchange of stock through the medium of a truestee, so as to enable the latter company to control the corporate management of appellant. As the Atchison, Topeka and Santa Fe Company is the lessee of the Canon City and San Juan Company, (now by consolidation the Pueblo and Arkansas Valley Company,) it is evident that the purpose was to operate the constructed lines of the Denver and Rio Grande as part of the Atchison, Topeka and Santa Fe system of roads, all as one common family. This purpose has been accomplished.

A lease was executed on October 19th last, and the same was confirmed by the stockholders of the Denver and Rio Grande Company, at a regular meeting convened for that purpose. Following the confirmation of the lease, the possession of the road was formally delivered to the Atchison, Topeka and Santa Fe Company, and has ever since been operated as a part of and in connection with its own lines. Contemporaneously with the lease, other contracts were signed for the purpose of carrying out this general scheme of compromise, all of them having reference to and being parts of the same transaction.

We apprehend that it will be the duty of the court to examine these contracts, and ascertain the real intent of the parties. If from them the conclusion is fairly inferrable, as we say it necessarily is, that the line of road from Canon City to Leadville was to be built by the Pueblo and Arkansas Valley Company—if this was the contemplation of the parties—then the prosecution of these appeals is in bad faith. In other words, if our right to build the road is conceded by these negotiations, there remains nothing for this court to determine, because it was to contest that right that these appeals were taken.

If the design was to abandon this competitive construction, unite the interests of the two roads, and thus end this controversy, a court of equity will give effect to that intention, the same as though there had been a formal stipulation to dismiss the appeals.

It must be premised that the ratification of the lease by the Denver and Rio Grande stockholders, and the subsequent delivery of the road to the lessee, is the consummation of the entire compromise. So far as either party imposed conditions precedent upon the other, the delivery of the road and its operation by the lessee ever since then without objection, shows either a performance or a waiver of those conditions. Certainly, the appellant cannot claim that this court shall not give full effect to its own voluntary act.

Further, that the compromise by which this *quasi* consolidation was effected, must be considered with reference to the then attitude of the parties. The very purpose of it, as will be evident from an inspection of the contracts, was to avoid the uncertain results of the hostile litigation then pending between the two companies, and to place both under a common management

and control. "To accomplish the closest practicable union short of actual consolidation," is the spirit breathed into President Palmer's circular to his stockholders.

If the lease itself is examined, it will be plain that the underlying idea is the demise for a long term of the entire constructed lines of the Denver and Rio Grande company, among others the portion of road from Pueblo, where it connects with the Missouri river system of roads, to Canon City, and that the right of the appellee to build a railroad from Canon City up the Arkansas river to Leadville, (and presumably through the Grand Canon which is the only practicable route, and the one upon which it was then building and has built,) was expressly recognized and provision made for the division of the earnings.

Article 3, after establishing a certain rental to be paid by the lessee, provides: "Whenever any passenger or freight shall be carried over the said demised railroad, or any part thereof, and also over the railroads of the party of the second part, or of the Pueblo and Arkansas Valley Railroad company, built or to be built, or any part of either, said party of the first part shall be, for each mile of such transportation over the demised railroad, entitled to share in the distribution of fare and freight moneys, as if the same were carried one mile and a quarter, except that transportation of business passing over that part of the hereby demised premises extending from Pueblo westward up the valley of the Arkansas river to Canon City, or any part thereof, and likewise over the line from Canon City to Leadville, shall only be reckoned mile for mile; it being the intention of this provision that the gross earnings from all business interchanged between said demised railroad, or any part thereof, and the railroads owned or controlled by the party of the second part, or by the Pueblo and Arkansas Valley Railroad company, built or to be built, or any part of any of them, shall be divided on the basis of crediting each mile of transportation over the hereby demised railroad, as one and one quarter miles; except where such business shall be interchanged between the demised line connecting Pueblo with Canon City, and the road which may connect Canon City with Leadville, in which case the gross earnings thereof shall be divided *pro rata*, according to the number of miles traveled over the respective roads."

The intent is clearly expressed. The earnings from all business *interchanged* between the Denver and Rio Grande Railroad

and the railroads operated by the Atchison, Topeka and Santa Fe company are to be divided upon a certain basis by crediting the mileage of each road a certain proportion of the earnings; except as to such business as is *interchanged* between the companies over that portion of the demised railroad between Pueblo and Canon City, and the line from Canon City to Leadville; as to which business, so interchanged, a different pro-rate is established according to the number of miles hauled over the respective roads.

The same article of the lease, covenant "A," provides, "That neither the Atchison, Topeka and Santa Fe company, nor the Pueblo and Arkansas Valley Railroad company, nor any other company which either of them may now or hereafter control, shall directly or indirectly build or operate or encourage any line or track not already constructed, that may be parallel to or competing with any constructed Denver and Rio Grande line, or impair the earnings or security thereof, nor lay a third rail or alter the gauge of any part thereof, (except between Pueblo and the coal mines east of Canon City,) without at the same time widening the gauge or laying a third rail over all Denver and Rio Grande lines."

If this covenant had stood without qualification, it would have prohibited the Atchison, Topeka and Santa Fe company from building between Canon City and Leadville; for the reason that at South Arkansas it would become a *competing* line with the already constructed road of the Denver and Rio Grande, having its terminus at Alamosa. At those points, Alamosa and South Arkansas, the roads would compete for the business of the same scope of territory. Accordingly *as an express recognition* of the fact that the Atchison, Topeka and Santa Fe company was to be permitted to finish its road between Canon City and Leadville, it is provided that the section above quoted "shall not be construed to mean that any line between Canon City and Leadville, or any extension beyond Leadville, is a competing line with any such constructed Denver and Rio Grande line."

And further, to guard against any temptation to the lessee to benefit its own line from South Arkansas east at the expense of the Denver and Rio Grande road from Alamosa to Pueblo, it is provided in covenant "E," "That the rates of transportation between South Arkansas and Pueblo, or any point east or north of

Pueblo, shall not be less than the rates on business between Alamosa and Pueblo, or said other points east or north of Pueblo."

The attitude of appellant, then, in prosecuting these appeals is to prevent and obstruct the completion of a great public enterprise, which we are accomplishing by its own assent, and as part of this general scheme to unite the interests of both companies.

The Court will observe that it was intended by these negotiations, not simply to convey by lease the entire constructed lines of the Denver and Rio Grande company to the Atchison, Topeka and Santa Fe company, but to place the corporate management of the former company under the control of the latter. The agreement executed between Messrs. Potts and Schlessinger in behalf of the Denver and Rio Grande company, and the Atchison, Topeka and Santa Fe and Pueblo and Arkansas Valley companies, provides that the Atchison, Topeka and Santa Fe company shall nominate two-thirds of the directors of the Denver and Rio Grande. This agreement was of a very general character, and was intended as preliminary to the lease and other contracts. The details of the interchange of stocks are provided for in the agreement between Wm. J. Palmer, president of the Denver and Rio Grande company, and Alden Speare, one of the directors of the Atchison, Topeka and Santa Fe company. It bears even date with the lease and makes reference to it. It recites that "Whereas the Denver and Rio Grande company has made and executed a certain instrument in writing bearing even date herewith, whereby it undertakes to grant, lease and demise its constructed road to the Atchison, Topeka and Santa Fe railroad company, and whereas such lease and this agreement are parts of the plan whereby the constructed railroad of the Denver and Rio Grande railway company and its stock should be controlled in the interest of the Atchison, Topeka and Santa Fe railroad company, and corporations whose roads are leased or otherwise controlled by it, and the present stockholders of the said Denver and Rio Grande railway company, or their assigns, receive full paid non-assessable stock of the Pueblo and Arkansas Valley railroad company in lieu of and on surrendering the shares of the Denver and Rio Grande railway company's stock, held by him or them respectively, at the rate aforesaid, which rate is based on the assumption that the indebtedness of said companies respectively, exclusive of stock, does not exceed a certain sum per mile of constructed road," etc.

Under this agreement there has been transferred to T. Jefferson Coolidge, Esq., of Boston, as trustee, 42,510 shares of the Denver and Rio Grande capital stock, the same being a controlling interest. This stock was purchased expressly for the purpose of obtaining control of the management, and hence the disposition of all pending hostile litigation between the two companies; it was the fundamental idea upon which the entire compromise proceeded.

See, now, what it is attempted to accomplish by the exercise of a little superior shrewdness. Mr. Coolidge and the beneficiaries whom he represents, together with other large stockholders of the Denver and Rio Grande company, unite in a request to President Palmer to call a stockholders' meeting for the purpose of taking corporate action in reference to this litigation. *The request is refused.*

We have endeavored to show that the contracts contemplated a dismissal of these appeals. It will be made more palpable by what follows. If such is the case, a court of equity will enforce them as a discontinuance. We claim more than that. The assignment of the majority in value of the Denver and Rio Grande shares of stock for the express purpose of transferring the control, and the illegal refusal of the officers of the corporation to call a meeting and thus place the control where it properly belongs, and where it was agreed it should go, shows bad faith, out of which this court will not permit the appellant to profit.

The Speare agreement above referred to provides: "That inasmuch as part of the debt of the Denver and Rio Gaande railway company in excess of $22,664.00 per mile has been incurred for work done and material expended for extending its lines, that such work done and material expended forms part of the assets aforesaid, and that whenever any such work or materials shall be used or taken possession of, or otherwise accrue to the benefit of the Atchison, Topeka and Santa Fe railroad company, or the Pueblo and Arkansas Valley railroad company, or any corporation whose road is or shall be leased or controlled by it, the Atchison, Topeka and Santa Fe Railroad company, the value of such work and materials so used and taken possession of, or otherwise accruing to the benefit of the Atchison, Topeka and Santa Fe Railroad company, or other corporation as aforesaid, shall be appraised by two persons, one to be appointed by the president

of the Atchison, Topeka and Santa Fe Railroad company and the other by the party of the first part, or in case such persons shall disagree, by an umpire to be appointed by the said president and the party of the first part." It will be seen from the circular of President Palmer to his stockholders that at the time these negotiations were concluded, the Denver and Rio Grande company had, in addition to its other floating debt, liabilities to the amount of $500,000, incurred by reason of certain extensions of its line. The assets of the company not included in the lease, such as supplies and materials on hand, are to be taken by the lessee at an appraisal, paid for, and the amount applied to reduce the indebtedness to a certain amount per mile. Part of this indebtedness was created in the construction of portions of roadbed upon the located line of the Pueblo and Arkansas Valley company over the ground in controversy; and as such isolated and uncompleted portions of grade could be utilized by the apellee and made available in the construction of its own line, it was stipulated that whenever so taken possession of, they should be paid for according to an appraisal. In legal effect, it was equivalent to a transfer of everything for which the appellant is contending in the prosecution of these appeals. It shows clearly the intent by these negotiations that we are to *complete* the enterprise which we had begun; and that instead of encountering opposition from the appellant by having injunctive relief invoked against us, we are to have its assistance to a speedy completion of the work.

The circular of President Palmer felicitates the stockholders of the Denver and Rio Grande company upon the successful negotiation of this compromise; and as an inducement to stockholders to exchange their shares according to the terms of the Speare agreement, he states very properly that it will enable the Denver and Rio Grande stockholders to participate in all extensions of the Pueblo and Arkansas Valley Railroad, *including its Leadville* and New Mexico extensions.

It must be kept in view, that these transactions do not contemplate a transfer of any *franchises* of the Denver and Rio Grande company, the legality of which might be doubtful. These are expressly reserved from the operation of the lease. Nor are they tantamount to a positive agreement on the part of the Denver and Rio Grande company, conclusive for all time, not to build between Canon City and Leadville. Such might be construed as the

alienation in part of its franchise, and as such void. Nor do the decrees of the lower Court erect any such barrier. Ample opportunity was given it by the decrees to proceed with its enterprise within or without our right of way, leaving but sufficient room to permit the convenient operation of the two roads. If its intention had been a proper one, it might well have availed itself of the opportunity given, instead of adopting a "dog in the manger" policy. We do claim for the compromise, however, the very purpose for which it was made, namely: That without hindrance from appellant, we were to finish the work which we had begun in April last, and upon which a large amount of money had already been expended at the time these negotiations were concluded.

In any view, therefore, the cases present no adversary proceedings, and should be dismissed.

Cleveland *vs.* Chamberlain, 1 Black, 419.

Platt *vs.* Jerome, 19 How., 384.

The Court must draw its own conclusions from the subsequent contracts made by the parties. As we regard them, the explanation of motives is not difficult. Discovering that in the multitude of other details, there has been no *formal* stipulation to dismiss the appeals, the present officers of the Denver and Rio Grande company think they may still have their day in court. If the decrees of the Circuit Court are sustained, they nevertheless receive payment for such work as is utilized by the appellee. If the decrees are reversed, a fine opportunity presents itself of setting up a claim to a railroad already constructed by the money of other people. It is true they have parted with the stock, and that the majority of the shareholders desire good faith to be maintained. This is a minor difficulty, however, which they avoid by illegally refusing to convene a meeting. A more cunning *coup d' etat* was never before attempted.

CHAS. E. GAST, *Solicitor.*

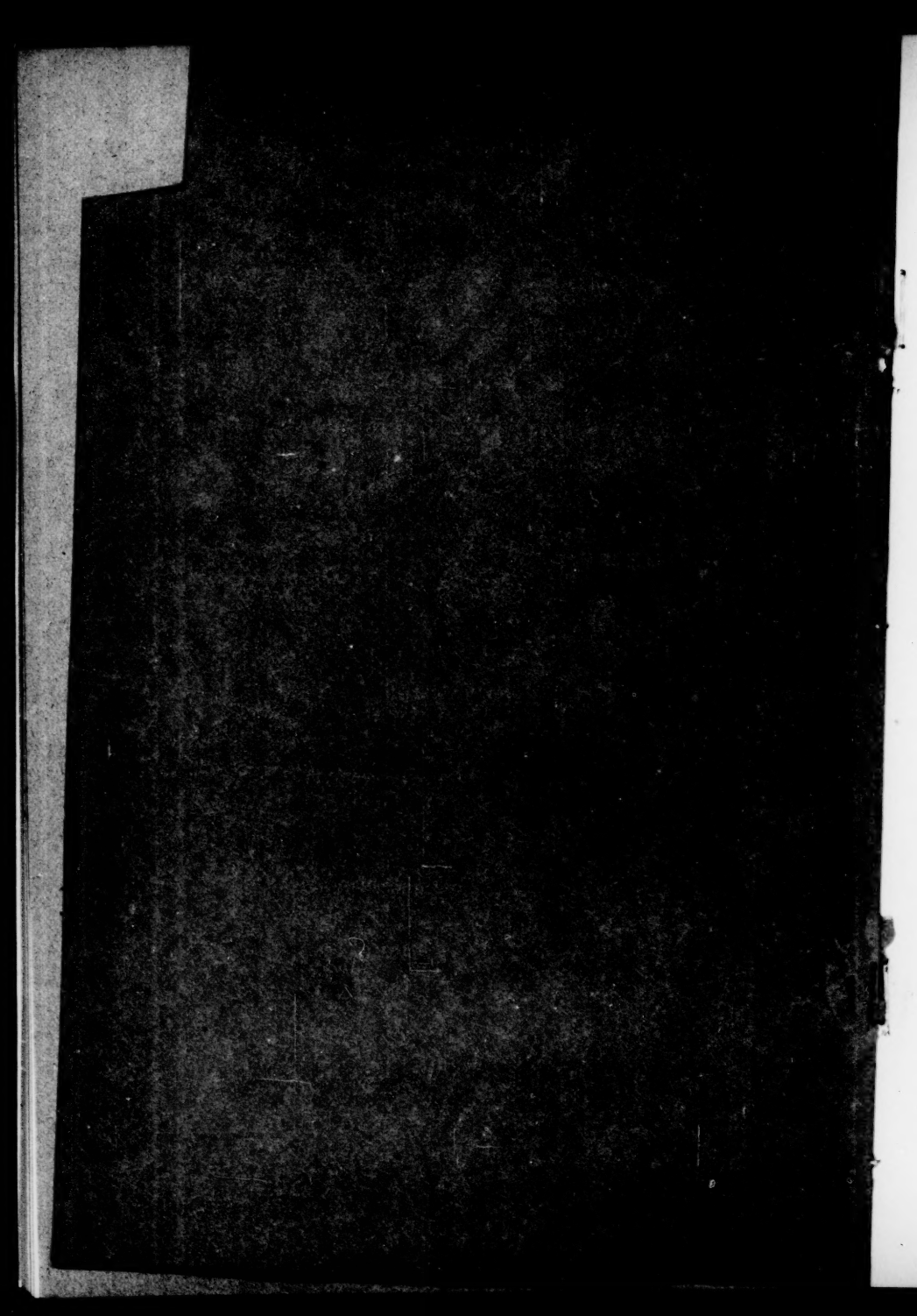
IN THE SUPREME COURT OF THE UNITED STATES.

Of the October Term, 1878.

THE DENVER AND RIO GRANDE RAILWAY COMPANY, *Appellant*, vs. EBENEZER T. ALLING, *et al.*, *Appellees.*	No. 811.
THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY, *Appellee*. vs. THE DENVER AND RIO GRANDE RAILWAY COMPANY, *Appellant.*	No. 812.

BRIEF ON BEHALF OF THE APPELLANT ON THE MOTION TO DISMISS THE APPEALS.

LYMAN K. BASS,
For The Denver and Rio Grande Railway Company, Appellant, opposed to said motion.



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For The Denver and Rio Grande Railway Company, Appellant, opposed to said motion.

3

STATEMENT OF THE FACTS.

The controversy in these causes grows out of conflicting claims by two railroad companies to occupy and possess the right of way over the public domain, for the construction of a railroad up the valley of the Arkansas River, through what is known as the Grand Cañon thereof.

It will appear by the record that the appellant, The Denver and Rio Grande Railway Company, claims under and by virtue of an act of Congress entitled "An act granting the right of way through the public lands to the Denver and Rio Grande Railway Company" approved on the 8th day of June, 1872 (17 Stat. 339), and of certain acts supplementary thereto, which are set out in the appellant's brief heretofore filed in these causes on the merits.

The Cañon City and San Juan Railway Company, appellee, claims under the general act of Congress of 1875 (Stat. 1874–5, p. 482).

The act of 1872 granted specifically to the Denver and Rio Grande Railway Company a right of way over the public domain for the construction of its line of railway,

under which grant it had built and put in operation three hundred and thirty-seven miles at the time this controversy arose, extending to Cañon City, near the mouth of the Grand Cañon of the Arkansas.

The Cañon City and San Juan Railway Company had then built nothing.

On the 19th day of April, 1878, The Denver and Rio Grande Railway Company set a force of engineers and men at work to extend its line of railway from Cañon City along the Arkansas Valley, through the Grand Cañon thereof, and thereafter, but on the same day, the Cañon City and San Juan Company extemporized a force of men and set it at work on the same right of way in hostility to the claims of the other company; and on the following day a suit was commenced and is now here depending, to determine the title to such right of way.

A decree was entered in these causes at the circuit on the 24 day of August, 1878, from which the Denver and Rio Grande Railway Company appealed on the day of August, and a written stipulation was entered into for their submission to this court on printed arguments under Rule 20.

Such submission was made by filing the arguments on the 10th day of January last.

Since that submission and on the 20th day of January the pending motion was filed to cancel the stipulation of submission and dismiss the appeals.

That motion is based upon certain agreements which bear date and were executed on the 19th day of October, 1878, and performance of a part of their stipulations by the respective parties thereto.

Those agreements were three in number and consist of:

1. A proposed lease of the actually constructed railroad, 337 miles in length, of the Denver and Rio Grande

Railway Company to the Atchison, Topeka and Santa Fé Railroad Company, including the appurtenances to such constructed railroad, and its rolling stock, and excluding everything else, for a term of thirty years from December 1, 1878.

2. An agreement between William J. Palmer of the one part and Alden Speare of the other, respecting an interchange of the stocks of The Denver and Rio Grande Railway and The Pueblo and Arkansas Valley Railway Company through the hands of T. Jefferson Coolidge as trustee, which agreement imposes certain charges upon the exchanged stocks respectively.

3. An agreement under which the proposed lease was placed in the hands of Sebastian B. Schlesinger, of Boston, to be held in escrow until the performance of the conditions therein named precedent to delivery.

A certain memorandum of agreement "to be made" between The Atchison, Topeka and Santa Fe Railroad Company, The Pueblo and Arkansas Valley Railroad Company, and The Denver and Rio Grande Railway Company, dated October 4, 1878 (page 14 motion papers), was made preliminary to the negotiations which resultedin the three agreements ~~requirements~~ aforesaid and is therefore superceded by them.

Palmers affidavit page 52

Under those agreements William J. Palmer deposited with T. Jefferson Coolidge 42,510 shares of the capital stock of the Denver and Rio Grande Railway Company, and the said Alden Speare deposited with said trustee 8,502 shares of the capital stock of the Pueblo and Arkansas Valley Railroad Company to make the interchange provided for; said stocks respectively to be held by said trustee under the charges in said agreement contained.

The stockholders of the Denver and Rio Grande Railway Company conditionally ratified said lease (see Palmer's affidavit), and it is alleged The Atchison and Topeka Railroad Company ratified it by its board of directors.

Certain of the conditions precedent to authorize a delivery of the lease out of escrow not having been performed, it was agreed that pending such performance a provisional delivery of the leased property to the lessee should be made, the lease however to continue in escrow until such full performance, and no rights of either party thereby to be prejudiced. Before delivery, however, the lessee was required to deposit a sum of money as a security for the payment by it of the amount of the appraisal of full material supplies which it should receive from the Denver and Rio Grande Railway Company, and thereupon and on December 14, 1878, such provisional delivery was made as shown by the orders on page 17 of the motion papers.

The lease yet remains in escrow in the hands of Mr. Schlesinger (see page 3, 4 Palmer's affidavit).

No other acts have been done or taken towards carrying out the agreements.

The motion seems to be based on two principal grounds.

1. That the agreements aforesaid constitute a settlement of these cases, on the assumption that they amount to a transfer of the right of way in question by the Denver and Rio Grande Railway Company to the Atchison, Topeka and Santa Fé Railroad Company, which therefore seeks to intervene in these cases as the owner of the appellant's rights, and to dismiss the appeals.

2. That the holding of a bare majority of the stock of the Denver and Rio Grande Railway Company by a trustee for the benefit of the Atchison, Topeka and Santa Fe Railroad Company gives it a right to control all the property and concerns of that corporation, notwithstanding the provisions of the Palmer-Speare agreement.

We deny both these propositions, and allege that this motion is made by the Atchison, Topeka and Santa Fe Railroad Company in combination with the Pueblo and

Arkansas Valley Railroad Company in the effort to sequestrate the valuable property, rights and franchises of the Denver and Rio Grande Railway Company to their own use and benefit without consideration and in violation of the terms of said agreements and of the equitable rights of the parties under the same.

FIRST.

The agreements in no way settle, adjust, compromise, or affect the litigation of these cases. That it is a real and not "*theoretical*" litigation, the zeal of the respondents on this motion attests.

The question involved is as to the right to occupy and possess the right of way upon which to build a railroad through the Grand Cañon of the Arkansas river The Denver and Rio Grande Railway Company did not intend to, and did not in fact, transfer or assign, or abandon that right to the Atchison, Topeka and Santa Fe Railroad Company by the proposed lease.

The proposed lease may be found at page 18 et. seq. of the motion papers, except that it should be dated the 19th day of October.

The first clause thereof, with the proviso, describes as fully and accurately as can be expressed by language, the property covered by the lease, and the court is respectfully asked to examine it.

It is as follows:

THIS INDENTURE, Made this 19th day of October, A. D. 1878, between the DENVER & RIO GRANDE RAILWAY COMPANY, a corporation duly organized and existing, owning and operating a railroad line in Colorado, party of the first part, and the ATCHISON, TOPEKA & SANTA FE RAILROAD COMPANY, a corporation

duly organized and existing under the laws of Kansas, party of the second part, witnesseth:

That in consideration of the sum of one dollar to it duly paid by the party of the second part at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and of the rents, covenants and agreements hereinafter reserved and contained, on the part and behalf of the party of the second part to be paid, kept and performed, the party of the first part to these presents has granted, leased and demised, and by these presents does grant, lease and demise unto the party of the second part, its successors and assigns, all and singular the railroad which the party of the first part has heretofore constructed and operated in Colorado, commencing in the city of Denver and extending thence southwardly *via* Colorado Springs to Pueblo, on the Arkansas river; thence, still in a southerly direction, *via* Cucharas to El Moro, in Colorado, and to the El Moro colleries; and also from Cucharas westward *via* La Veta and Garland to Alamosa, on the Rio Grande del Norte; and also from Pueblo westward, up the valley of the Arkansas river to Cañon City and the Cañon coal mines—in all about three hundred and thirty-seven miles of railroad, more or less, exclusive of sidings; together with the lands and premises occupied by or connected therewith; together, also, with the rolling stock, equipment and appurtenances to the railroad hereinbefore described belonging or in anywise appertaining and owned or acquired by the party of the first part in connection therewith; also all rights, privileges and franchises of the said party of the first part necessary to the operation and management of said hereinbefore described railroad or the business thereof; including in the said premises hereby demised all the railroads, ways and rights of way; all the depot grounds, tracks, bridges, viaducts, culverts, fences and other structures, depots, station houses, engine houses, car and freight houses, and other buildings, machine shops and other shops, machinery and tools, and all other lands and property whatsoever belonging to the

party of the first part, and which have heretofore been used or acquired for use in connection with the said hereby demised railroad or the business thereof;

Provided, however, That nothing herein contained shall operate to grant or demise, or be construed to include the franchise to be a corporation heretofore conferred upon the said party of the first part or the corporators thereof, or any other right, privilege or franchise which is or may be necessary or requisite to preserve the corporate existence and organization of the party of the first part; and all such franchises to be a corporation, and all rights and privileges, other than those hereinbefore granted and demised, are hereby expressly reserved and exempted from these presents.

TO HAVE AND TO HOLD the said hereinbefore described railroad and premises with the appurtenances unto the party of the second part, &c.

We look in vain at that part of the lease where the draughtsman has described the property leased or conveyed for any language that can include the right of way in question; those parts expressly exclude any and all rights, privileges and franchises which do not necessarily pertain to the actually constructed railroad.

If the parties designed, the one to transfer, and the other to acquire, this valuable right, why was not language appropriate to its transfer put in the lease?

It can not be said to have been an obscure object, not in the minds of the parties, for a serious controversy then existed, and had existed for months over that precise question.

The reason why such right was not included in the lease is clearly stated in the affidavit of Wm. J. Palmer, (see affidavit page 54 to 58 of appellant's papers) and was, because

the parties were unable to agree on the question, and therefore it was designedly omitted from the negotiations.

Meyers affidavit pages 27, 28

But it is now claimed on behalf of the makers of this motion, that although there has been in terms no transfer or assignment of the rights in question by the Denver and Rio Grande Company yet certain traffic agreements in the lease are to be construed to accomplish that result by way of abandonment.

In support of this view the appellees quote three paragraphs from section 3 of the lease, which in our view of them, instead of tending to prove the position of the appellees, prove exactly the contrary, to-wit: That the agreements were intended not to prejudice the rights of either party in the pending litigation.

The court will bear in mind the situation of the parties at the time of the completion of the negotiations in question, on the 19th day of October.

1. Each party was claiming the right to occupy and work upon that right of way to the exclusion of the other.

2. Each party was claiming that the court of last resort would adjudicate in its favor, and so give it the right to build its railroad to Leadville from Cañon City to the exclusion of the other over the contested right of way.

3. Each party had a force of workmen employed on that right of way at various points beyond the Grand Cañon, grading and preparing a road-bed for its railway, at large expense.

In view of these facts, we submit there is no ambiguity in the phraseology of Article 3, and that the construction claimed for it by the other side is groundless.

The article does not purport to define the leased property; that had already been done; it purports to fix the

rental to be paid and establishes certain conditions and rules for estimating it, to extend over the period of thirty years, to-wit :

1. That the rental shall be a given percentage of gross earnings.

2. That the gross earnings shall be estimated on the basis of crediting the leased railroad with 1¼ miles to every mile of transportation over the lessor's roads of the freight carried.

3. Except where such business shall be interchanged between the demised line connecting Pueblo with Cañon City, and the road which *may* connect Cañon City with Leadville, in which case the gross earnings shall be divided *pro rata* according to the number of miles hauled over the respective roads.

The intent and effect of the above exception is clear.

1. It is clear that it was not the intent of the exception to transfer the lessors right of way, or to lease it.

2. It shows each road claimed and contemplated that it would be adjudicated the right to build the line from Cañon City to Leadville, as the language applies equally well to either.

3. The Atchison and Topeka Company agrees by it, that in the contingency of its building the line freights should be pro rated as stated in the exception.

4. The Denver and Rio Grande Company agrees that if it builds the line between Cañon City and Leadville freights shall be interchanged between it, and the line it had leased between Pueblo and Cañon City, *pro rata*, as therein stated.

Thus each company, by the exception, guarded against

the contingency of the line being constructed by the other, the Court bearing in mind that no unbuilt line of the Denver and Rio Grande Railway Company was leased, and therefore that all new lines built by it would be operated independently of the leased lines.

The next section of Article 3, ("a") conforms to the same construction.

By the first clause thereof, the lessee company covenants that it will not "directly or indirectly build, operate or encourage" any line of railroad parallel or competing with any Denver and Rio Grande constructed line.

The effect of that covenant without the exception immediately following it, would have been to absolutely exclude the Atchison and Topeka Company and all roads controlled or operated by it, from all right for thirty years to build or aid the building of a line from Cañon City to Leadville, and therefor the purpose of saving to itself any rights it might have in the construction of the road it was then seeking to build, (and in controversy in these cases,) the exception to the effect "that the foregoing section should not be construed to mean that any line between Cañon City and Leadville, or any extension beyond Leadville, is a competing line with any such constructed and Rio Grande line," was incorporated in the agreement.

Without that exception, success in this litigation would have availed nothing to the appellees, or the makers of this motion. The exception was not designed to transfer any rights of the lessor corporation, but to prevent prejudice to the claimed rights of the lessee to build that line of railroad if the courts should ever give it the privilege. It in no way recognizes the present right to build such a line by either company.

"The same explanation applies to the other clause in covenant "e" of article 3, "that the rates of transportation

between the South Arkansas and Pueblo, or any point east or north of Pueblo, shall not be less than the rates on business between Alamosa and Pueblo, or said other points east or north of Pueblo."

The foregoing are the only clauses of the lease which it is pretended furnished the basis for the movers herein, to claim that the Denver and Rio Grande Railway Company by that instrument transferred, assigned, or *abandoned* its right of way in controversy in these cases.

It has already been shown in hostility to that claim.

1. That such right of way is expressly reserved in the most explicit language from the operation of the lease, and

2. That the clauses quoted are all taken from Article 3, which has relation to the amount of rental to be paid, and the principles upon which it is to be based, and do not concede in terms or by implication any right to the lessee company or any other company, to occupy or possess the right of way and property of this appellant, but that the rights of the appellant in that regard are strictly preserved and retained.

In further confirmation of the fact that it was not the intent of the parties to transfer or abandon the rights of the lessor to the Grand Cañon of the Arkansas or to end "all controversies" as alleged in the motion as filed, we respectively refer.

1. To the affidavit of William J. Palmer, one of the parties to the negotiations (see appellant's affidavit. Pages 54 to 58, before cited

2. To the affidavit of Theo. F. H. Meyer, Esq., who was conversant with the negotiations and drew the lease. (Page 28, 9). Potts affidavit p. 1-3. Supplemental papers Schlesingers do. p 4-7 letters; Lathrops do p 9 Russels. p. 13-

3. Letter from Schlesinger to Nickerson, parties to or connected with the negotiations. (Page 119-20. appellants affidavits and same letter with copy 13 of that to which it is a reply pages 4 to 8, Supplemental affidavits -

4. The conduct of the parties following the execution of the papers, namely:

The papers were executed October 19, 1878. The deposit of stocks took place about December 1st. The provisional delivery of the railroad took place December 14th, and nothing has been accomplished since towards carrying out the negotiations, yet, since those dates, both companies have at all times kept their forces at work in the Arkansas valley; both parties have vigorously litigated other causes in the circuit court involving other parts of the same right of way, not involved in these cases; both parties prepared and filed their briefs in these cases under Rule 20, in this court, on the merits, and these cases were thereupon, about January 10th last, submitted to this court for final adjudication, and not until after that, and ~~not until and on~~ the filing of this motion on the 20th of January, did the appellant ever hear of the claim of settlement now set up. Nickersons letter of Feby 10th Supplementary papers, p. 6. folio 18 to end.

Why the Atchison, Topeka and Santa Fe Railroad Company then for the first time discovered it had settled these cases, and changed front in the litigation, we are not advised authoritatively. Opposed to all the foregoing evidence is solely the uncorroborated affidavit of Nickerson

But the PALMER-SPEARE AGREEMENT is equally conclusive that it was not the intent of the negotiators to transfer or abandon the right of way in question, on behalf of the lessor or to acquire it by the lessee.

The attention of the court for this purpose is called to the following clause thereof:—(See page 111-112.

"It is further agreed that whatever assets the said Denver and Rio Grande Railway Company may have outside of said demised railroad and premises at the time of surrendering possession thereof to the Atchison, Topeka and Santa Fe Railroad Company, or accruing to it afterwards on account of the administration of its business before such

date, shall be well and truly applied towards the payment of such debts of said company (in excess of the said sum of twenty-two thousand six hundred and sixty-four dollars per mile), as the party of the first part may direct and in such manner as he may direct, and that the trustee hereunder, or the person to whom the trustee may hereafter transfer and assign the stock which shall be deposited with him by the party of the first part, shall at all times, and whenever requested, aid and assist with his or their vote on such stock or otherwise howsoever in carrying out this provision."

It is then further provided in the next succeeding clause of the agreement, "that the work done and materials expended for extending its lines," "forms part of the assets aforesaid, and that whenever any such work or materials shall be used or taken possession of, or otherwise accrue to the benefit of The Atchison, Topeka and Santa Fe Railroad Company or The Pueblo and Arkansas Valley Railroad Company, or any corporation whose road is or shall be leased or controlled by it, The Atchison, Topeka and Santa Fe Railroad Company, the value of such work" shall be appraised and paid for.

The object and intent of the foregoing provisions is clearly expressed.

1. To re-affirm the statement of the lease, that all assets (or property of every kind and nature upon which a creditor of the corporation would have a right to rely for payment of a debt due him) was reserved to the Denver and Rio Grande Railway Company.

2. The appellees concede in their argument (see Brief for appellees, page 11, bottom of page), that "these transactions do not contemplate a transfer of any *franchise* of the Denver and Rio Grande Company * * these are expressly reserved from the operation of the lease, nor are they tantamount to a positive agreement on the part of the

Denver and Rio Grande Company, conclusive for all time, not to build between Canon City and Leadville," and as the clause quoted expressly designates the work and materials expended on the right of way in question (as well as upon other rights of way), to be part of such reserved assets, it is conclusive that all franchises, rights of way, work, materials and property on the contested territory was reserved to the Denver and Rio Grande Company.

3. The clause in question in no manner transfers or purports to transfer or to abandon such work and materials to the lessee When the option in that behalf given shall be exercised, it will be time for the appellees to say that the appellant has abandoned its work and right of way, but in the meantime it foresees no such unfortunate contingency. Its right of way is the valuable property in controversy, and not the work on it only.

SECOND.

There is not any identity of interest between the Denver and Rio Grande Railway Company on the one hand and the Atchison, Topeka and Santa Fe Railroad Company, or the Pueblo and Arkansas Valley Railroad Company, or the Cañon City and San Juan Railway Company, on the other, as corporations, other than as herein stated.

As between the first-named company, and the two named last, there is no relation whatever. As between the first two named, there is no community of interest except as each is or may be concerned in requiring the other to obey the terms of the said lease, provided it shall ever go into effect.

As is already shown that lease has no provision affecting the property in controversy in these cases other than to reserve it absolutely to the Denver and Rio Grande Company.

The alleged ownership by the Atchison, Topeka and

Santa Fe Railroad Company of one-half plus ten shares of the stock of the Denver and Rio Grande Railway Company, does not constitute it the corporation, nor authorize it to control or direct it, or its policy, or confiscate its rights, except in obedience to the law of the corporation.

The appellant company was organized in 1870 under the laws of Colorado. Section five of the act authorizing its formation, provided as follows:

"Sec. 5. The stock, property and concerns of such company shall be managed by not less than three, nor more than nine, trustees, who shall respectively be stockholders in said company, and who shall (except the first year,) be annually elected by the stockholders, at such time and place as shall be directed by the by-laws of the company."

The by-laws of the company appoint the last Friday of November in each year as the time for the annual meeting.

The rights of the corporation were expressly confirmed and granted to it again by the Act of Congress of June 8, 1872, before quoted, and by an act supplementary thereto, approved March 3, 1875.

(See appellant's argument on the merits.)

Such has been the law of this corporation since its formation. Stockholders are not charged with the management of the property and concerns of the corporation, and have no duty in that regard except to elect the directors, and thereafter if the directors violate their trust they may be enjoined or any of the ample remedies provided by the law, adopted against them.

Hopkins v. Rose Clair Lead Co., 72 Ill., 373.
Gashwiller v. Willis, 33 Cal., 12.
Kiener v. Johnson, 1 Stockton, 401.
Gifford v. New Jersey R. R. 2. Stockton, 171.

No provision is made in the law of this corporation for allowing one stockholder to usurp the functions of its Board of Trustees.

The trustees and officers of the corporation represent all the stockholders, the 42,490 shares not held by The Atchison, Topeka and Santa Fe Company as well as the 42,510 shares held by or for it. The makers of this motion do not represent any interest in this corporation except their own stock.

The Board of Trustees likewise represents the interests of the bondholders and creditors of the company.

Jackson v. Ludeling, 21 Wallace, 616.

No proceedings have been taken against the Board of Trustees under any pretence that they have violated their trust, and we think we will be able to show that if they did or attempted to do what the movers are seeking to accomplish, they would be liable to the corporation creditors and stockholders for breach of their trust.

The stockholders of this company at the same meeting at which they ratified the lease as herebefore stated, directed the prosecution of these suits. The Board of Trustees on the 3d day of Dec'r 1878, likewise directed the prosecution of these suits, and again after the motion herein was filed, and on the 7th day of February, 1879, the Board of Trustees again passed resolutions re-affirming the former resolutions.

See stockholders resolutions; appellants printed papers page 7 (IV). Directors resolutions, pages 5 (III). 10 (XII)

Thus this corporation is bound by the action of its regularly constituted authorities, to prosecute to final adjudication these cases, and to avail itself of the benefits of the final decrees therein.

THIRD.

The objects sought by the makers of this motion are in direct hostility to the corporate interests and rights of the Denver and Rio Grande Railway Company. The interposition of this court is asked to enable the Atchison, Topeka and Santa Fe Company and the companies under its control, to confiscate to their own use the valuable property and rights of The Denver and Rio Grande Company.

The theory upon which the motion was made is stated on page three thereof.

"So that by reason of the premises" (to-wit: the lease, agreements, ownership of stock, and delivery of road) "the said Atchison, Topeka and Santa Fe Railroad Company, in its own right and in connection with the said Pueblo and Arkansas Valley Railroad Company, has become and is equitably the owner and entitled to the control of all the affairs, suits, interests and property of the said Denver and Rio Grande Railway Company; and especially to the discontinuance of all litigation hostile to the interests of the said Atchison, Topeka and Santa Fe Railroad Company and the said Pueblo and Arkansas Valley Railroad Company."

The makers thereby avowing with equal candor and boldness that their object is the exclusive benefit of themselves.

21 Wallace 616 (supra.)

"But where the fact is established that under the pretence of serving the interest of one company the shareholders in a rival company by purchasing shares for the purpose of litigation can make the court the instrument of defeating or injuring the company into which they so intrude themselves * * * in such case it is not the province of the court to interfere."

Ffooks v. London and S. W. R. R. Co., 19 Eng. L. and Eq. 7.

But the attention of the court is asked to the provision of the Palmer-Speare agreement, hereinbefore quoted, as proof that *the said 42,510 shares of stock can not be made the foundation of this motion.*

That provision requires that the trustee, or the person to whom he shall transfer it thereunder "*shall at all times and whenever requested, aid and assist with his or their vote, on such stock or otherwise howsoever, in carrying out this provision,*" *to-wit: the preserving and securing to the Denver and Rio Grande Company all its assets, outside the demised railroad and premises.* (See ~~said~~ argument, page 15 .)

This provision succeeds, and is in the nature of, an exception to the earlier provision referred to in Coolidge's affidavit, that he was required to vote on said stock as Speare should direct, and therefore controls it.

We, therefore, submit that as that stock was deposited with Coolidge *in trust* and for the uses and purposes designated in the agreement between Palmer and Speare, the request of Palmer therein to protect and defend the reserved assets of this company, of which the rights and interests involved in these cases is a most material part, must be strictly obeyed Coolidge violated his trust, when he made his affidavit in this case, and the Atchison and Topeka Railroad Company, in whose behalf he committed that breach of duty, cannot be allowed to avail itself of that wrong, to enable it to make these motions.

Palmer had no notice or knowledge that Coolidge proposed to make such an affidavit until after it was made. (Palmer's affidavit, page 30).

Immediately upon being advised thereof he disavowed and dissented from the act, and thereafter and heretofore,

on being informed that Coolidge had delivered the stock to Speare, requested the latter to join in opposing this motion (See affidavit, page 30-1 & 38

Palmer has therefore taken every step in his power to preserve the integrity of the unleased assets of this company, and appeals to the rule that "those things which in equity ought to have been done, will be considered by the court as having been done" as sufficient ground to say that the assent of that stock has not been properly given to the making of this motion, and therefore it must be denied.

The effect of granting these motions would be to turn the appellant out of this court without a hearing, and to put the appellees in the exclusive possession of the right of way claimed by this company.

That right of way is valued by competent experts at more than one million dollars. It is of greater value to this company than to any other, because it has already at large cost constructed its line of railway up to the mouth of the Canon in dispute, whereas, no other railroad is within forty miles of it. The makers of this motion therefore in effect, seek to acquire to their own use and exclusive benefit, property of the value of upwards a million dollars, in derogation of the rights of the owners of 42,490 shares of the capital stock of this company and of every one of its creditors, for no stockholder (other than the Atchison and Topeka Corporation) and no creditor, assents to this motion.

Palmer's affidavit, page 49-50 & page 121

Such dissenting stockholders and creditors would have the undoubted right to enjoin the trustees of this company against such a sacrifice of their property and interests.

See covenant to creditors page 122

The statement contained in the motion, that the Atchison, Topeka and Santa Fe Company has an agreement providing for the further purchase and ownership of the re-

mainder of the capital stock of this company is not true in fact (see Palmer-Speare agreement, page 109 (II)), which is the sole foundation for the statement. That company cannot by right acquire a single share beyond what it has already.

It rests solely in the discretion of the stockholders of this company and of William J. Palmer whether another share shall be exchanged.

The appellant, therefore, asks that these motions be denied.

March 17 79 Rec A H Swag

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1878.

THE DENVER AND RIO GRANDE RAILWAY COMPANY, *vs.* *Appellant*, EBENEZER T. ALLING, et al., *Appellees.*	No. 811.
THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY, *vs.* *Appellee*, THE DENVER AND RIO GRANDE RAILWAY COMPANY, *Appellant.*	No. 812.

ARGUMENT FOR THE DENVER AND RIO GRANDE RAILWAY COMPANY: ON THE MOTION OF THE ATCHISON, TOPEKA AND SANTA FE RAILROAD COMPANY AND OTHERS TO CANCEL THE AGREEMENT TO SUBMIT THESE CAUSES AND DISMISS THEM, AT THE APELLANT'S COST.

By GRANT, RISLEY, MEYER, and others,

For the Denver and Rio Grande Railway Co.

STATEMENT OF THE FACTS ON THE MOTIONS, MADE BECAUSE NOT CORRECTLY MADE BY THE MOVERS.

The Atchison, Topeka and Santa Fe Railroad Company is a defendant in No. 811, and though not a party to the record, is the real plaintiff in No. 812, as fully appears in the evidence in that case and stated in the opinion of the court below.

The Pueblo and Arkansas Valley Railroad Company and T. Jefferson Coolidge are not parties to the record, or to the suits.

They aver, in their motions, "that the Pueblo and Arkansas Valley Railroad Company owns a railroad which, with its branches and extensions, is a continuation in Colorado of the Atchison, Topeka and Santa Fe Railroad Company: That since the pendency of these suits in this court, contracts and arrangements have been made and executed between the Denver and Rio Grande Railway Company, the Atchison, Topeka and Santa Fe Railroad Company and Pueblo and Arkansas Valley Railroad Company with the consent of Alling and others, which have been made since the filing of the stipulation for arguments, and completed and in part executed since the filing of the printed arguments: Whereby the Atchison, Topeka and Santa Fe Railroad Company

has taken a lease of all the constructed lines of the Denver and Rio Grande Railway Company, and has received and is now in possession of and operating said lines, and has received and purchased all the railroad supplies of the Denver and Rio Grande Railway Company, and has purchased and has had transferred to a trustee for its use, a majority of all the shares of the Denver and Rio Grande Railway Company stock with an agreement providing for the purchase of the remainder, and an agreement that the Atchison, Topeka and Santa Fe Railroad Company and Pueblo and Arkansas Valley Railroad Company should have the election of a majority of the Directors of the Denver and Rio Grande Railway Company, the bondholders of the Denver and Rio Grande Railway the other third, said contracts and arrangements having been made with the intent and design of ending all controversies and especially all competitive construction of railroads, between the Denver and Rio Grande Railway Company and the Atchison, Topeka and Santa Fe Railroad Company, or roads constructed by it, including Pueblo and Arkansas Valley Railroad Company: That by reason of the premises the Atchison, Topeka and Santa Fe Railroad Company has become and is in equity the owner and entitled to control all the affairs, suits, interests and property of the Denver and Rio Grande Railway Company, and especially to discontinue all hostile litigation to Atchison, Topeka and Santa Fe and Pueblo and Arkansas Valley Railroad Companies," and T. Jefferson Coolidge as the trustee aforesaid joins in the motion as set forth in his affidavit."

Affidavits to maintain this motion are filed by Thomas Nickerson and T. Jefferson Coolidge.

The affidavit of Nickerson, of which no printed copy was furnished us under the rule, and we can't cite by the page, says:—

1. That he is President of the Atchison, Topeka and Santa Fe Railroad Company, and Treasurer of the Pueblo and Arkansas Valley Railroad Company.

2. That the Cañon City and San Juan Railroad Company is lawfully consolidated with the Pueblo and Arkansas Valley Railroad Company ; but he shows no contract of consolidation and no date of such a contract, whether before or after filing argument in these causes.

3. That the Atchison, Topeka and Santa Fe Railroad Company has for two years and more had possession and control of the Pueblo and Arkansas Valley Railroad Company under a lease, but whether Pueblo and Arkansas Valley Railroad Company has a mile of road in operation, or whereto, or wherefrom, no where appears by any paper or writing dated before or after filing of briefs or these causes.

4. That since the pending in the Supreme Court of the appeals in these causes, and since the filing of the printed arguments upon said appeals contracts and agreements have been made between the Denver and Rio Grande Railway Company and Pueblo and Arkansas Valley Railroad Company and Atchison, Topeka and Santa Fe Railroad Company by virtue of which the Denver and Rio Grande Railway Company has leased to the Atchison, Topeka and Santa Fe Railroad Company *its railroad and property* for thirty years from 1st December, 1878, and on 13th December, 1878, delivered possession of said *railroad and property*, and the Atchison, Topeka and Santa Fe Railroad Company has now full possession and control of the same, and contracted to deliver and has delivered to a trustee for the benefit, and to be under the control of said Atchison Topeka and Santa Fe Railroad Company, a majority of all the stock of said Denver and Rio Grande Railway Company, and a further contract for the purchase by or in behalf of said Atchison, Topeka and Santa Fe Railroad Company of the remainder of the capital stock of the Denver and Rio Grande Railway Company with the design and intention to vest in said Atchison, Topeka and Santa Fe Railroad Company the entire control and disposition of all the affairs of the Denver and Rio Grande Railway Company, and with the further agreement

that the Atchison, Topeka and Santa Fe Railroad Company was to have the election of two-thirds of the directors of the Denver and Rio Grande Railway Company, and the bondholders the other third. That these contracts have been made with the concurrence and for the benefit of Pueblo and Arkansas Valley Railroad Company and said Alling and others, whereby the Atchison, Topeka and Santa Fe Railroad Company has become and is equitably the owner and entitled to the control, management, direction and disposal of all the affairs, suits, interests and property of said Denver and Rio Grande Railway Company, as by said several contracts, leases, and declarations of trust will more fully appear.

Filed on the same day with this affidavit, and as we have a right to suppose, to be intended as evidence of the contracts and agreements executed subsequent to the filing of the arguments, which, by the appellees, was after first January, 1879, are the following papers :

No 1. *MEMORANDUM OF AGREEMENT* between the Atchison, Topeka and Santa Fe Railroad Company, Pueblo and Arkansas Valley Railroad Company, by their Presidents, and the Denver and Rio Grande Railway Company, by Schlessinger and Potts, dated 4 October, 1878, whereby the Atchison, Topeka and Santa Fe Railroad Company is *to take a lease* of the Denver and Rio Grande Railway Company, to operate the latter's road at 35 per cent. of gross earnings and such further sum as may be agreed upon by Presidents of the two roads : The Pueblo and Arkansas Valley Railroad Company agrees to purchase all stock of the Denver and Rio Grande Railway Company that is offered at the rate of one share of Pueblo and Arkansas Valley Railroad Company's to five of Denver and Rio Grande Company's, and Denver and Rio Grande Railway Company agrees to convey at least ten shares over half its stock in sixty days. The Pueblo and Arkansas Valley Railroad Company guarantees

that its debt does not exceed eleven thousand seven hundred dollars per mile and its stock does not exceed fifteen thousand four hundred and thirty-eight dollars per mile of constructed road. The Denver and Rio Grande Railway Company guarantees that its debt does not exceed $22,664 per mile of constructed road, and its stock does not exceed $25,000 per mile of constructed road.

The Directors of the Atchison, Topeka and Santa Fe Railroad Company were to nominate two thirds of the Directors of the Denver and Rio Grande Railway Company. The Denver and Rio Grande Railway Company was to make a lease of the finished road. The agreement is dated 4th October, 1878, and was made subject to the approval of the President of the Denver and Rio Grande Railway Company, in the paper annexed to the Nickerson affidavit.

As it nowhere appears that it was approved by him, the consideration of this piece of evidence whether made before or after the filing of the arguments in the cause which was as late as 9th January, 1879, may be left out of the case, as it was superseded by the next paper referred to.

No. 2. The next paper filed, as one of the contracts completed and in part executed since the filing of the arguments in this cause, is a lease, of which no printed copy has been furnished us, therefore, we cannot refer to the page, dated 19 October, 1878, between the Denver and Rio Grande Railway Company and the Atchison, Topeka and Santa Fe Railroad Company, whereby the Denver and Rio Grande Railway Company in consideration of certain rents, leases to the Atchison, Topeka and Santa Fe Railroad Company for thirty years from 1st December, 1878, "all the "railroad which the Denver and Rio Grande Railway Com-"pany has constructed and operated in Colorado, commencing

"at Denver, thence to Pueblo, thence southerly *via* Cucharas "to El Moro and from Cucharas to Alamosa, on the Rio "Grande del Norte, in all about 337 miles of railroad with "rolling stock, equipments and appurtenances, with all the "rights, privileges and franchises necessary to the operation "and management of said described railroad, including depot "ground, etc., which have been used or acquired for use in "connection with said described railroad. *Provided, however*, "that nothing herein contained shall operate to grant or de- "mise, or be construed to include the franchise to be a corpo- "ration heretofore conferred on the Denver and Rio Grande "Railway Company, or any other rights, privileges, or fran- "chises, which is or may be necessary or requisite to preserve "the corporate existence or organization of the Denver and "Rio Grande Railway Company, and all such franchises to be "a corporation, and all rights and privileges other than those "heretofore granted, are hereby expressly reserved and ex- "empted from these presents."

The lease was subject to a mortgage debt of $22,664 per mile, and had a covenant that its stock did not exceed eight millions five hundred thousand dollars in all. It also contained covenants of trust, covenants by the Atchison, Topeka and Santa Fe Railroad Company not to build or operate any rival lines except that a road built by the Atchison, Topeka and Santa Fe Railroad Company or the Pueblo and Arkansas Valley Railroad Company to Leadville would not be considered a competing line, covenants as to traffic, covenants as to repairs, covenants to deliver possession by 1st December, covenants to pay for supplies on hand at a price to be fixed by two referees and an umpire, and various other covenants as to traffic and business.

It contains no agreement whatever to transfer to the Atchison, Topeka and Santa Fe Railroad Company 42,510 shares of stock, or to give it and the bondholders the appoint-

ment of the Directory of the Denver and Rio Grande Railway Company.

As the Potts and Schlesinger agreement of the 4th October, 1878, was a mere protocol or promise to make a lease, it ceased to have any force when the lease was executed, and all things referred to in it and omitted from the lease were of necessity abandoned.

There is also filed at the same time, 20th January, 1879, a notice dated 13th December, 1878, by W. J. Palmer, President of the Denver and Rio Grande Railway Company, that the Denver and Rio Grande Railway Company having leased its *constructed line* from Denver to Pueblo, El Moro and Alamosa and Cañon City, that possession of the leased line and property would be given on 13th December, 1878.

And a similar notice by W. J. Palmer, President of the Denver and Rio Grande Railway Company, and W. B. Strong, Vice-President of the Atchison, Topeka and Santa Fe Railroad Company, both in relation to the constructed railway of the Denver and Rio Grande Railway Company, and also a circular of Palmer to the stockholders.

How this lease and these notices refer to the unfinished line of the Denver and Rio Grande Railway Company from Cañon City up the Arkansas, or the other unleased property, rights and franchises of the Denver and Rio Grande Railway Company, does not appear from the papers themselves, or in any other way than the affidavit of Nickerson, which they in plain terms contradict.

There is also filed resolutions of the executive committee of the Pueblo and Arkansas Valley Railroad Company, on the 25th of November, 1878, stating that in view of business connections with the Atchison, Topeka and Santa Fe Railroad Company, the Pueblo and Arkansas Valley Railroad Company will deliver to the Atchison, Topeka and Santa Fe Railroad Company seventeen thousand shares of the full paid stock of the Pueblo and Arkansas Valley Railroad Company.

For what purpose in connection with agreements made, (since the filing of the briefs in these causes on 9th January, 1879,) to transfer the Denver and Rio Grande Railway Company's property and franchises to the Atchison, Topeka and Santa Fe Railroad Company, this paper is filed does not in the paper itself appear.

It directly contradicts Nickerson's affidavit that the Atchison, Topeka and Santa Fe Railroad Company had possession and control of the Pueblo and Arkansas Valley Railroad Company, and publishes to the world such a breach of the laws of Colorado governing the Pueblo and Arkansas Valley Railroad Company, as will subject its charter to dissolution by quo warranto.

There is also filed with this affidavit of Nickerson, a certificate of Speare, dated 26th of November, 1878, that 8,502 shares of Pueblo and Arkansas Valley Railroad Company Stock, standing in his name on the books of said company, are held by him in trust for the purposes of his agreement with Wm. J. Palmer, dated 19th October, 1878, and for the use and benefit of Atchison, Topeka and Santa Fe Railroad Company, and he agrees at any time to transfer it as the Atchison, Topeka and Santa Fe Railroad Company may decide. He further agrees that all money received by him as dividends on said stock and also on the Stock of the Denver and Rio Grande Railway Company that he may receive in exchange for Pueblo and Arkansas Valley Railroad Company's, as provided in said agreement belonging to the Atchison, Topeka and Santa Fe Railroad Company, and to vote or give powers to vote on such shares of both companies as the executive committee of said Atchison, Topeka and Santa Fe Railroad Company should in writing request.

How this paper dated 26th November, 1878, shows an agreement made after briefs filed to transfer the entire property and franchises of the Denver and Rio Grande Railway Com-

pany, and equitable right to control this suit, does not appear in the paper itself, nor by any explanation.

The next and last paper filed in connection with Nickerson's affidavit is the affidavit of T. Jefferson Coolidge, in which he says that under and in execution of the agreement, between William J. Palmer and Alden Speare, a copy of which is annexed, he has received and holds 42,510 shares of stock of the Denver and Rio Grande Railway Company, being a majority of the shares of the corporation, (the contract is dated not since 1st January 1879, but on 19th October 1878.) That among the trusts under which he holds the same, he is to vote upon said shares, as he may be directed by said Speare, and that he has been applied to, and directed by said Speare to use the powers by him possessed under said agreement to procure the discharge of all stipulation by which these suits are to be submitted on briefs for adjudication, and further to procure the dismissal of both of said suits so that all litigation on the subject matter thereof may be terminated.

The agreement between Palmer and Speare, dated 19th October, 1878, then provides that on or before 1st December, 1878, there shall be deposited by W. J. Palmer with T. Jefferson Coolidge, as trustee, 42,510 shares of Denver and Rio Grande Railway Company's stock, being a majority of the stock of the Company, and Speare shall deposit with Coolidge 8,502 shares of Pueblo and Arkansas Valley Railroad Company stock, to be exchanged on certain conditions, thereafter to be performed, at the rate of five shares of Denver and Rio Grande Railway Company stock for one share of Pueblo and Arkansas Valley Railroad Company's, and that Palmer shall have the right within a limited time to deposit more of shares of Denver and Rio Grande Railway Company's stock to be exchanged for Pueblo and Arkansas Valley Railroad Company stock, various acts are to be performed before this exchange takes place.

And there is the following clause in the agreement:

"The said trustee shall have the legal title to all the Den-"ver and Rio Grande Railway Company stock deposited with "him by Palmer, and shall vote upon the said stock as directed "by the said Speare."

Further on in said agreement, about two pages, is the following trust imposed on Mr. Speare:

"It is further agreed that whatever assets the said Denver "and Rio Grande Railway Company may have outside of said "demised railroad and premises at the time of rendering posses-"sion thereof to the Atchison, Topeka and Santa Fe Railroad "Company, or accruing to it, afterwards on account of the "administration of its business before such transfer, shall be "well and truly applied toward the payment of such debts of "said Company in excess of the said sum of $22,664 per mile "as Palmer may direct and in such manner as he may direct, "and the trustee hereunder, or the persons to whom the "trustee may hereafter assign the stock which shall be depos-"ited with him by the party of the first part, shall at all times "aid and assist, with his or their vote on such stock or other-"wise howsoever in carrying out this provision."

A few words on these papers come appropriately in this place.

Not a contract is produced showing that it was the intention or design of the Denver and Rio Grande Railway Company to surrender its right to the right of way or property on its unfinished road to the Atchison, Topeka and Santa Fe Railroad Company, and it is shown by the lease they produce that they neither leased, bought, purchased, or acquired any rights in the Denver and Rio Grande Railway Company's charter or property except the constructed roads.

These suits, when these papers were executed, were appealed and are pending here. If the Atchison, Topeka and Santa Fe Railroad Company and Pueblo and Arkansas Valley Railroad Company desired to purchase the right and property in controversy, why not say so in words in the paper writing? Why

allow the paper writing to exclude these things from the lease?

These papers, so far from showing agreements, subsequent to filing the briefs to transfer "all the property and business of the Denver and Rio Grande Railway Company" to Atchison, Topeka and Santa Fe Railroad Company or any other party, expressly reserve the unleased lines from the conveyance. They are all dated prior to filing of the briefs, and if executed, were all executed before the filing of the briefs. So far from sustaining the facts alleged in the motion and affidavit of Nickerson, they prove them to be false.

They not only show that there never was any intention to surrender the unfinished road and franchise, but to protect and preserve them to the Denver and Rio Grande Railway Company. If Speare's certificate means anything, it means that he intended by it to practice a fraud on Palmer, when he made the agreement of 19th October. By that, he agrees to protect the assets of the Denver and Rio Grande Railway Company, not conveyed by the lease, from destruction. By his certificate he holds all the stock in both companies for the benefit of the Atchison, Topeka and Santa Fe Railroad Company.

And how dare Coolidge come here and move to dismiss these suits under a power to *vote* on stock as Speare may direct. What has a power to *vote* on stock to do with the control and dismissal of a law suit. By the express terms of Speare's agreement, he was bound to give his vote to protect the rights involved in this suit by obeying Palmer's instruction.

The facts as shown and explained by the affidavits filed by the Denver and Rio Grande Railway Company are:

I. That the Denver and Rio Grande Railway Company Directors, who alone govern the affairs of the corporation, as well as stockholders, oppose these motions.

See their resolutions, page 10 of printed affidavits hereto annexed.

Resolutions of stockholders, page 7

affs of State & McAllister printed separat

II. That the lease of the constructed line of the Denver and Rio Grande road, 337 miles, (which by the most positive language excepts the subject matter of this controversy from its provisions, the unfinished road through the Cañon of the Arkansas,) is yet in escrow, and not delivered.

See the contract of the Denver and Rio Grande Railway Company to the Atchison, Topeka and Santa Fe Railroad Company of same date as lease of 19th October, 1878, page 103, and Palmer's affidavit, pages 56. 65-74

III. That the delivery of possession on 13th December of the constructed road by Palmer, was made provisional by him subject to the delivery of the lease.

See Palmer's affidavit, page 73.

See ~~extract from~~ Nickerson's letter, page 1183

IV. That the agreement between Speare and Palmer, as to the exchange of stock is not yet performed and may not be for two years. That Speare accepted the stock under the express trust named therein, that it was to be used as Palmer might direct to protect all assets, outside of the demised property of the Denver and Rio Grande Railway Company, and that whoever holds it, is to be governed by Palmer's direction, and that Speare has been instructed by Palmer to oppose these motions.

See the Speare agreement, page 111.

See Palmer's affidavit, pages 31-35. 37-38

V. That during all the negotiations which resulted in the escrow lease for the finished road of 337 miles, the right to the exclusive use of the Cañon of the Arkansas, and the whole subject matter of this controversy was reserved from the lease, and this reservation was fully discussed and made

known to the agents of Atchison Topeka and Santa Fe Railroad Company in that negotiation.

See Palmer's affidavit, page 58 .

See Meyer's affidavit, page 26/7 .28

See Schlessinger's letter to Nickerson, page 119/20, in which the following words occur :

"The lease of the Denver and Rio Grande Railroad Company conveys only 'the railroad heretofore constructed and operated by that company' and describes it. It distinctly premises that 'all rights and privileges other than these (specified) were expressly reserved and exempted.'"

The affidavits of Schlesinger and Potts, being made in Philadelphia and Boston, are printed separately and confirm their letters to Nickerson.

See Potts' affidavit, page

VI. That the Atchison, Topeka and Santa Fe Railroad Company does not own a dollar of stock in the Denver and Rio Grande Railway Company.

See Palmer's affidavit page 44.

Nickerson's letter to Palmer, 12th December, 1878, page 44 .

Wagner's certificate page 44.

VII. That the Potts and Schlesinger protocol of 4th October, 1878, was never approved by the Directory of the Denver and Rio Grande Railway Company nor their stockholders, and it ceased to have any force against anybody when the lease paper was signed.

See vote of stockholders approving the lease, page 5 ,

And Palmer's affidavit that the protocol was never submitted to the Board of Directors, page 52 .

VIII. All the papers show that no agreement of any kind has been made since the filing of the briefs, giving the Atchison, Topeka and Santa Fe Railroad Company the right to control these suits and dismiss them; and that no such agreement was ever made at any time since the controversy began in relation to the control of the Arkansas Cañon, in April, 1878.

IX. It is shown that the Denver and Rio Grande Railway Company has continuously, since the controversy began in March, 1878, up to this time, asserted its rights to the Cañon now in controversy, and have expended $250,000 in building its road over the ground to which it claims the right of way.

See Weitbrec's affidavit page 22-23

By the examination of the case made by the movers in its strongest light it appears.

I. The Atchison, Topeka and Santa Fe Railroad Company assumes to control and govern the Cañon City and San Juan Railroad Company, and through it disputes the right claimed by the Denver and Rio Grande Railway Company.

II. That they have leased the the constructed line of the Denver and Rio Grande Railway Company, and in that lease the Denver and Rio Grande Railway Company reserved the right of way and right to build the road in controversy in this suit.

III. That the Atchison, Topeka and Santa Fe Railroad Company claim to control the Cañon City and San Juan Railway Company, the defendant in one suit and the plaintiff in the other suit, and the Pueblo and Arkansas Valley Railroad

Company, and have through Speare in direct violation and breach of his trust, got the control of 42,510 shares of stock of the Denver and Rio Grande Railway Company, just ten shares over a majority of the entire stock, and by reason of such majority claims in equity to nullify the action of the Denver and Rio Grande Railway Company, (who are opposed to dismissal) and should have the right to dismiss them, though it may ruin the most valuable part of the Denver and Rio Grande Railway Company's franchise, to the prejudice of the minority of stockholders and the Company's creditors, without compensating either.

LAW ARISING ON THESE FACTS.

It has been the law of this court through a series of decisions from Dodge and Woolsey to this time that the stockholders of a corporation cannot control the directory in the management of its affairs, or bring or defend suits in the name of the name of the corporation, except when the directory have been guilty of some breach of trust or duty, or prejudicial to the stockholders, or refuse to bring a suit, or do some act necessary to protect the corporate property, and that no stockolder can bring such suit, until he demanded of the directory that they bring the suit and they refuse, or do some act which is tantamount to such refusal.

In one of the opinions delivered by this court, it was argued against the exercise of such power as is now claimed by the movers that a wealthy party might buy up a majority of the stock and use it to the ruin of the corporate property. We feel quite sure the gentlemen who advised this motion have never read the opinion of this court in such questions, or if they did, they have forgotten them.

The Certificate of Incorporation of the Denver and Rio Grande Railway Company, provides as follows:

5. The number of the trustees of said company shall be "five: and William P. Mellen of New York, R. Henry Lam- "born of Philadelphia, Alexander C. Hunt of Denver, William "J. Palmer of Colorado, Howard Schuyler of Colorado, are "hereby designated as trustees to manage the concerns of said "company for the first year of its existence.

The General Incorporation Act of Colorado provides:

SECTION 6. The corporate powers shall be exercised by "a board of directors or trustees of not less than three nor more "than thirteen, who shall respectively be stockholders in said "company, and who shall, (except the first year,) be annually "elected by the stockholders, at such time and place as shall be "directed by the by-laws of the company and public notice of the "time and place of holding such elections shall be published not "less than ten days previous thereto, in the newspaper printed "nearest to the place where the operations of said company shall "be carried on, and the election shall be made by such of the "stockholders as shall attend for that purpose, either in person "or by proxy; *provided*, a majority of the stock is represented. "If a majority of the stock shall not be represented, such meet- "ing may be adjourned by the stockholders present for a period "not exceeding sixty days. All elections shall be by ballot and "each stockholder shall be entitled to as many votes as he owns "shares of stock in the said company; and the persons receiv- "ing the greatest number of votes shall be directors or trustees "who shall hold their offices until their successors are elected "and qualified, and when any vacancy shall happen among the "directors or trustees by death, resignation, or otherwise, it shall "be filled for the remainder of the year as shall be provided by "the by-laws of said company."

The parties who make the motion, assume that because the Denver and Rio Grande Railway Company leased its constructed road to the Atchison, Topeka and Santa Fe Railroad Company, and provided for the contingency which might arise that if the Pueblo and Arkansas Valley Railroad Company should build a road to Leadville, it should not be a competing line, therefore they intend to abandon their right in controversy with the Cañon City and San Juan Railway Company, though the lease itself says in as plain terms as words can express that such was not the intention. Their papers nowhere show where the Pueblo and Arkansas Valley Railroad begins or ends; no where show that it has or owns a mile of road in operation; if the fact was important we could show it had not a mile finished.

It is averred that the Pueblo and Arkansas Valley Railroad Company has consolidated with the Cañon City and San Juan Railway Company. But such a consolidation will, so far as these suits are concerned, subject it to the burdens of the latter company's road, and will not give any greater right to the Cañon City and San Juan Railway Company.

It is so argued in the brief, but is not in the record of any of the papers filed and examined by us, and this brief is too long to go outside of the record. By that record we know that the Cañon City and San Juan Railway Company, with which the Denver and Rio Grande Railway Company has this controversy has not a mile of finished road, and is contesting with the Denver and Rio Grande Railway Company the right of way and depot grounds over the six miles of the Cañon and fourteen miles above in the valley of the Arkansas. Now, what right has the Atchison, Topeka and Santa Fe Railroad Company and the Pueblo and Arkansas Valley Railroad Company in the contest, if it is not adverse to the plaintiff's rights over the same ground?

The moving parties show no paper agreement, by which the Denver and Rio Grande Railway Company has conveyed,

leased or surrendered its right to this twenty miles to them or any of them. The papers show just the contrary. The counsel say: "The court will observe that it was intended by "these negotiations, not simply to convey by lease the entire "constructed lines of the Denver and Rio Grande Railway "Company to Atchison, Topeka and Santa Fe Railroad Com- "pany, but to place the management of the former company "under the control of the latter," page 9 of brief.

We say, as the student taught by Martin Luther said to him, "Where is your evidence?" It is not in the lease. On the contrary the lease excludes everything not conveyed in express terms, and says nothing of the management.

The protocol of Potts and Schlesinger was ended by the lease is a nonentity for want of Palmer's approval. It appears to be a volunteer and friendly act of Potts and Schlesinger to induce a negotiation and was never presented to or ratified by the directors or stockholders.

See Palmer's affidavit, page 82

Its promises are not carried into the lease, and of course are superceded by it. No such intention is shown by the Palmer and Speare agreement; on the contrary, Speare is bound to vote in relation to the subject matter of this controversy as Palmer directs. But why answer an argument made on a personal contract of Speare and Palmer, when discussing the intentions of the Denver and Rio Grande corporation?

It was not in the interchange of opinions and discussions between the parties. The affidavits of Palmer and Meyer and the letters of Schlesinger and Potts to Nickerson (pages) show that the Denver and Rio Grande Railway Company never intended to surrender the rights claimed in the Arkansas Cañon.

Now, suppose for a moment that the Atchison, Topeka and Santa Fe Railroad Company had a written agreement that

they should own a majority of the Denver and Rio Grande Company's stock and control the franchises of the latter company; what would be their duty as such managers in these motions? Why this contest is for a part of the property of the Denver and Rio Grande Railway Company, "richer than all its tribe."

The Leadville Silver Mines are now producing an emigration to Colorado compared with which the forty-nine emigration to California is as insignificant as the wagon trains of that year to the Pacific Railroad of to-day.

People from all parts of America and Europe are flocking to this modern bonanza, with a devotion as intense and ardor as pressing as pilgrims to Juggernaut or Mecca or to Rome; and this emigration is filling the coffers of three railroads, the nearest of which is a hundred miles distant.

A road through the Arkansas Cañon to these mines, from its cheapness and grades defies competition and its business in a single year will pay for its construction. Put up the right at auction to-morrow, and it will bring a million of dollars.

Does the Atchison, Topeka and Santa Fe Railroad Company venture to come into this court and say, that it is entrusted by the Stockholders and Creditors of the Denver and Rio Grande Railway Company with the control of its affairs and say, that it will renounce this right and dismiss their suits? Why if they would, possessing such power, put a resolution on their record to do it, the poorest equity judge in America, at the suit of a single Stockholder or a single Creditor of the Denver and Rio Grande Railway Company, would prevent it.

Let us admit that it is the manager of the Denver and Rio Grande Railway Company, and has the control of property, which it is bound to administer, not to its own advantage to plunder and to rob, but to foster and protect for the creditors

first, and then for its Stockholders, and instead of moving to dismiss these suits a "court of equity" of which the motion speaks, would compel it to prosecute them.

The reverse action would be a collusive suit by Cañon City and San Juan with Atchison, Topeka and Santa Fe to get an adverse decision to the Denver and Rio Grande.

We are referred in the counsel's brief to

Lord vs. Veasey, 8 Howard 254,

Where this court heard a third party, whose rights were affected by a fictitious suit, come in and move to dismiss the suit; and

Cleveland vs. Chamberlain, 1 Black 419,

Where a like order was made; and

Platt vs. Jerome, 19 Howard, 384,

Where it was held a party to the suit has a right to compromise it, without his Attorney's consent.

Who says this is a collusive suit? Who are the colluding parties? With whom is the Denver and Rio Grande colluding? With the Atchison, Topeka and Santa Fe Railroad Company? No. With the Pueblo and Arkansas Valley Railroad Company, or the Cañon City and San Juan Railway Company? No. Look at the evidence in the record of this court, and the opposing parties. Who then are the colluding parties? The Atchison, Topeka and Santa Fe Railroad Company has not purchased or leased the property in dispute. It has not paid a dollar to any party for the stock which it pretends to claim and does not own. Yet, having leased other property, while it is litigating this through the Cañon City and San Juan Railway Company, it now seeks by a fraudulent use of the stock, which it does not own, to dismiss a suit, where it fears a decision fatal to its attempt to deprive the lessor of a vested right. This is not a "cunning coup d'e tat." It is a bold and

impudent fraud of a wealthy corporation, seeking by hook or by crook, to deprive a poorer one of its rights. The charge it makes of bad faith has no force against us, but *Mutato nomine de te fabula narratur.*

This is not a case of collusive suits, brought to prejudice the rights of third parties; nor a case where the plaintiff has sold his interest in the suit, and ordered its dismissal, or authorized its dismissal, but it comes under that very small class of experiments where persons, not parties to the record, have come into this court for the first time and sought to establish an adverse right to claimant and thrust him out of court.

No doubt that this court has to take its time in hearing a great many questions which do not belong to this tribunal to try, but we venture to say that it is the first time since its organization that a party defendant in a court below has had the assurance, after he has submitted his cause in this court, to come here and ask to be made plaintiff, and to dismiss the appellant's suits at the appellant's cost. Such a motion never was made before, and probably, after this one is disposed of, will never be made again.

In Harrison vs. Nixon, 9 Peters, 484 to 494

The court held against parties claiming an interest in the subject matter of the suit, "that the only parties the court can "know are those in the record. They cannot permit persons "who represent parties who may think themselves interested, "not in the record, to come in and interfere."

The case in 8 Peters, 281, was cited adversely, but it appears, on reading the case, that the parties claiming an interest by transfer had been made parties in the court below by consent.

In the Stephen Morgan, 4 Otto, 599,

This court held, "Parties who do not appeal from a final "decree of a circuit court, which is regular in form, cannot be "heard in opposition to the decree when the cause is removed "here by the opposite party, unless it appears that the proceed-

"ings in removing were unauthorized or irregular." They may be heard in support of the decree, citing the

William Bagaley case, 5 Wallace, 377.

Harrison vs. Nixon, 9 Peters, 494.

Canter vs. Insurance Co., 3 Peters, 318.

"A party who does not appeal can only be heard in support of "the decree."

The Quickstep, 9 Wallace, 665.

"Affidavits of newly discovered evidence will not be received. "This court must affirm or reverse upon the case as it appears "of record. We cannot look out of it for testimony to "influence the judgment of this court, sitting as an appellate "tribunal."

"If the established chancery practice had been otherwise, "the act of Congress 3d March, 1803, 2 L. & B., page 244, ex- "pressly prohibits the introduction of new evidence in this "court except in admiralty and prize cases."

Russell vs. Southard, 12 Howard, 139–59.

"No new evidence can be taken or received (in this court) "without violating the best established rules of evidence."

Mitchell vs. The United States, 9 Peters, 711–715.

"By the rules of the appellate court it cannot act on evi- "dence which was not before the court below or receive any "paper that was not used at the hearing."

Boone vs. Childs, 10 Peters, 177.

"This court will not suffer its judgment upon an appeal "to be influenced in any respect by new testimony offered here, "even in a case which is within its general chancery powers."

United States vs Knight's administrator, 1 Black, 488–9.

Motion to dismiss an appeal in a decree of foreclosure refused, though the appellant had, after appeal, issued execution and collected the amount of decree appealed.

Merriam vs. Haas, 3 Wallace, 687.

These citations are sufficient as to the rules and practices of this court. But it conclusively appears from the documents referred to in the affidavits of both parties, that none of the movers have any direct interest in the matters in the controversy. Their rights relate to and come out of an escrow of a lease for certain finished lines of road, 337 miles long, and specifically named in the lease.

The Atchison, Topeka and Santa Fe Railroad Company, a stranger in one of these suits and a defendant in the other, proposes on affidavits to be made a plaintiff in both and to dismiss the appellant's suit, at the appellant's cost, alleging that it has an inchoate right to control the appellant corporation. The appellant denies the truth of these affidavits in general and detail and the conclusions of law derived therefrom. Here we have an issue of facts to be tried not made in the court below. This court not only does not try new issues of fact, but will not allow them to be made. If the Atchison, Topeka and Santa Fe Railroad Company has any grievance against the appellant corporation, by reason of any alleged fact since the appeal, its remedy is before an inferior court by filing a proper bill there, making an issue and trying of the fact. This court cannot listen to new parties or hear new issues.

Admitting every allegation that has been made to be true, the Atchison, Topeka and Santa Fe Railroad Company have a contract not yet completed and never may be, by which it claims to own a majority of the stock of the Denver and Rio Grande Railway Company. That contract is not executed, the right claimed is denied. It never may be executed, and if the claim of the Atchison, Topeka and Santa Fe Railroad Com-

pany is persisted in it never will be. The proposed contract was made to protect a lease of a finished road and not to destroy a franchise, or right, or interest not yet leased, but expressly reserved. If the contract is to be used to wipe out of existence the most valuable part of the franchise of the Denver and Rio Grande Railway Company. it will never be carried into execution, until this court on an issue and trial below and appeal here compels it.

We ought to enlarge this brief by explaining various clauses in the lease, as to freight arrangements between these roads made and intended to apply to interchanges af an intimate connection in business, which have no bearing on the chartered rights of the claimants. But it is already too long.

In Muller vs. The Rock Island road, decided at October Term, 1877, it was held that the attorney who prepared this brief could not withdraw an agreement to submit a cause on printed briefs, though he claimed to have made it by mistake. He was held to his agreement, and it was adjudged that he could not withdraw it. And there is no reason in any of these papers why that decision should not be followed in the present cases.

GRANT, RISLEY, MEYER,

WELLS, SMITH & MACON,

For the Denver and Rio Grande Railway Company.

Jany 6, 79 Sub U.S.A.S

IN THE SUPREME COURT.

No. 812

October Term, A. D. 1878.

THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY, *Appellee*,

vs.

THE DENVER AND RIO GRANDE RAILWAY COMPANY, *Appellant*.

Appeal from the Circuit Court for the District of Colorado.

In the Supreme Court.

OCTOBER TERM, A. D. 1878.

The Canon City and San Juan R'y Co.,
APPELLEE.

vs.

The Denver and Rio Grande R.y Co.,
APPELLANT.

APPEAL FROM THE CIRCUIT COURT

For the District of Colorado.

CANON CITY & SAN JUAN RAILWAY COMPANY,

vs.

DENVER AND RIO GRANDE RAILWAY COMPANY.

INDEX TO RECORD.

NOTE.—This Record is folioed in two series: the first, numbered from folio 1 to 383, contains all proceedings had to the filing of the report of the testimony, which was heard orally, in another case, and by stipulation of counsel considered in this case: the second, numbered from folio 1 to folio 564, contains the report of the testimony, the accompanying exhibits and the decree and proceedings in relation to appeal.

FOLIO 1 Transcript of record of proceedings had in State Court; including, (fol. 3) the complaint; (fol. 16) undertaking for injunction; (fol. 21) order allowing injunction; (fol. 22) summons; (fol. 28) petition for removal to Circuit Court; (fol. 52) bond for removal; (fol. 62) second petition for removal; (fol. 86) bond for removal; (fol. 94) approval of bond; (fol. 95) order of State Judge declining to order removal.

100 Motion of defendant to annul injunction.

104 Motion of plaintiff to remand cause.

106 Leave given to file amended bill; injunction modified and allowed.

115 Amended bill.

144 Exhibit to bill; articles of association of plaintiff.

153 Subpœna.

158 Writ of injunction.

163 Order modifying injunction.

167 Opinion of District Judge Hallett.

213 Opinion of Circuit Judge Dillon.

224 Demurrer to amended bill.

231 Demurrer confessed.

232 Amendment to bill.

233 Cross bill.

294 Subpœna on cross bill.

299 Stipulation that evidence to be taken in the case of Denver and Rio Grande Railway Company vs. Alling et al. shall be considered in this case on the final hearing; and that defendant may answer on or before, etc.

302 Answer.

376 Replication.

378 Motion to dismiss cross bill.

382 Cross bill dismissed.

FOLIO 1 Report of testimony in the case of Denver and Rio Grande Railway Company vs. Alling et al.

546 Final decree.

553 Appeal prayed and allowed.

556 Affidavit of value.

559 Bond in appeal.

CIRCUIT COURT, COLORADO.

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1 Pleas in the Circuit Court of the United States, for the District of Colorado.

Be it remembered that heretofore and on to-wit: the 4th day of May, A. D. 1878, came H. A. Risley, Esq., a solicitor of this Court, and filed in said Court a certain transcript of proceedings theretofore had in the District Court, within and for the county of Fremont, State of Colorado, in a certain cause in said court theretofore pending, wherein the Cañon City and San Juan Railway Company was plaintiff, and the Denver and Rio Grande Railway Company was defendant: and the said transcript of proceeding is in words and figures as follows, to-wit:

TRANSCRIPT PROCEEDINGS, DISTRICT COURT,
FREMONT COUNTY.

STATE OF COLORADO, }
COUNTY OF FREMONT. } ss.

Pleas in the District Court of the Third Judicial District of the State of Colorado, within and for

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the county of Fremont, in vacation, of the April Term, A. D. 1878.

Hon. JOHN W. HENRY,
Judge of said District.
BENJ F. SHAFFER,
Sheriff of said County.
JOHN WILSON,
Clerk of said Court.

Be it remembered that on the 20th day of April, 1878, there was filed in the office of the Clerk of the District Court aforesaid, a certain complaint, which is in the words and figures following, viz.:

COMPLAINT.

3 In the District Court of the Third Judicial District of Colorado, in and for the county of Fremont, in said State.

In Vacation.—April, 1878.

STATE OF COLORADO, } ss.
COUNTY OF FREMONT. }

THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY—*Plaintiffs*,
—versus—
THE DENVER AND RIO GRANDE RAILWAY COMPANY—*Defendants*.

Complaint for Injunction and Relief.

The Cañon City and San Juan Railway Company complains of the Denver and Rio Grande Railway Company, and respectfully represents unto the Hon. John W. Henry, Judge of said court, that said Cañon City and San Juan Railway Company is organized as a body corporate, under and by virtue of the provisions of the general

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4 incorporation laws of the State of Colorado, the same being contained in chapter eighteen (18) of the Revised Statutes of the then Territory, now State of Colorado, approved January 10th, 1868, and the acts amendatory thereto, they having filed their acceptance of the provisions of the present general laws of said State respecting corporations; that the above named defendants, the Denver and Rio Grande Railway Company, is also a corporation doing business as such in the State of Colorado, and existing by virtue of the laws thereof; that said Cañon City and San Juan Railway Company, in their articles of incorporation filed in the office of the County Clerk of Fremont county aforesaid, at 12 o'clock M., on the 17th day of

5 February, A. D. 1877, and recorded in book "B" of Mgs., page 511 and 512, among other things, designated the objects and purposes of said company to be to construct, improve and maintain a railroad to carry passengers and freight between Cañon City, in said county of Fremont and a point known as the South Arkansas postoffice, in the county of Lake, in said State of Colorado, commencing at said company's depot site in said Cañon City, to be hereafter located, thence up the valley of the Arkansas river, through the Grand Cañon thereof, thence by the most practicable route following the Arkansas river to the point known as the South Arkansas postoffice, in the

6 county of Lake aforesaid, with the usual powers and authority as stated in said certificate of incorporation.

And said plaintiffs further represent that after said organization, to-wit: in the year A. D. 1877, the said Cañon City and San Juan Railway Com-

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pany did, in pursuance of said certificate of incorporation, and to effectuate the purposes of their organization, locate, by the usual surveys, their line of railway as aforesaid, and mark said location by the usual stakes, and did proceed, with all practicable diligence to construct said road according to said location, by grading the same at various points on the line of said projected road, one of which points is at the entrance to said
7 Grand Cañon, at or near the said town of Cañon City, and said grade is now being worked upon by the employees of said company, and said entrance is now in the possession of said company.

And said plaintiffs further represent that they have, in good faith, performed every requirement of the law required of corporations; that the stockholders of said company have paid in the required proportion of the stock subscribed by them, and that maps and plats of the line of said road, as proposed, have been filed in the proper offices, and that by virtue of the laws of Colo-
8 rado, and of the United States, said company *have* acquired the right of way one hundred feet on each side of the centre of track over their said proposed line, and are legally possessed thereof. And said plaintiffs further represent that the said Denver and Rio Grande Railway Company, defendants herein, disregarding the acquired rights of said plaintiff as aforesaid, have begun to locate, and are now locating a line of railway upon the located line of said plaintiffs' at the entrance of said Grand Cañon, near the said town of Cañon City, by their engineer, assisted by a large force of men, and, plaintiffs believe, at other
9 points on plaintiffs' aforesaid location; that at or

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near said first mentioned place, the said Denver and Rio Grande Railway Company, by their engineers and employees, have crossed the grade aforesaid, and have located their survey stakes upon the graded bed of said plaintiffs' road; that said Denver and Rio Grande Railway Company have now in the immediate vicinity of said Grand Cañon, and in and about said town of Cañon City a large force of men to proceed at once to grade the line of road which they have, since plaintiffs' location as aforesaid made, and that the officers, agents, surveyors, engineers, contractors and
10 workmen of said company are threatening to proceed at once to complete their railroad by grading, tieing and ironing it, without regard to the rights of plaintiff as aforesaid, and to destroy plaintiffs' road completed as aforesaid wherever it may be located upon their line of construction, and to do other acts and things in complete disregard of plaintiffs' legally acquired rights in the premises—all of which acts and things, if done, will be an irreparable injury to said plaintiffs.

And said plaintiffs further say that the said Denver and Rio Grande Railway, their officers, agents, surveyors, engineers, contractors and employees ought to be restrained from further locat-
12 ing the line of said proposed railway upon the line of said plaintiffs' road, and that said company, and their said officers, agents, surveyors, engineers, contractors and employees ought to be restrained from building their proposed railroad upon the line of plaintiffs' road, or upon any part thereof, and from destroying the grade of said plaintiffs' road as aforesaid, by the order and injunction of this honorable court, all of which said

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defendants threaten to do, and also restrained from committing any further destruction in and about, or to said plaintiffs' acquired rights as aforesaid, or any part thereof.

13 Forasmuch, therefore, as said plaintiffs are without remedy, except by the order and injunction of this honorable court, for the irreparable injury complained of hereof may be done if the required legal notice be given, and that the case is too urgent to admit of delay incident to giving notice; and to the end that said defendants, who are made party defendants to this bill, may be required to make full and direct answer to the same, may it please your honor to grant unto said plaintiffs the people's writ of injunction,

14 directed to the said defendants, their officers, agents, surveyors, engineers, contractors and employees, and each of them restraining and enjoining them, and each and every of them, and all others acting in aid or assistance of them, from locating a railroad by survey upon the line of plaintiffs' road, or upon any part thereof, and from in any manner destroying or interfering with the grade of plaintiffs' road or right of way, as the same is located and staked one hundred feet on each side of the centre line of the track, and from in any manner disturbing the rights of the plaintiff, acquired as aforesaid.

Cañon City and San Juan Railway Company.
By A. G. Stanley and W. M. Lock,
their Attorney.

April 19th, 1878.

15 STATE OF COLORADO, } ss.
COUNTY OF FREMONT. }

James Clelland, being duly sworn, says as

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follows: 1st. That he is Treasurer of the Cañon City and San Juan Railway Company, the plaintiffs, and that the facts stated in the above and within complaint are true to the best knowledge, information and belief of said affiant.

JAMES CLELLAND.

Subscribed and sworn to before me, this 19th day of April, 1878.

R. A. BAIN, County Judge.

16 THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY—*Plaintiffs*, —versus— THE DENVER AND RIO GRANDE RAILWAY COMPANY—*Defendants*. } *Undertaking.*

Whereas, the above named plaintiffs have commenced or are about to commence an action in the District Court of the Third Judicial District of Colorado, within and for the county of Fremont, against the above named defendants, and are about to apply for an injunction in said action against the said defendants, enjoining and restraining them from the commission of certain acts as in the complaint filed in said action is more particularly set forth and described;

17 Now, therefore, we, the undersigned residents of the county of Fremont, in consideration of the premises and of the issuing of said injunction, do jointly and severally undertake, in the sum of one thousand dollars, and promise to the effect, that in case said injunction shall issue, that the said plaintiffs will pay to the said party enjoined such damages, not exceeding the sum of one thousand dollars, as such party may sustain by reason of said injunction if the said District Court finally

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decide that the said plaintiffs were not entitled thereto.

18 CAÑON CITY AND SAN JUAN RAILWAY COMPANY.
JAMES CLELLAND,
A. A. ROBINSON,
M. N. MEGURE,
F. A. RAYNOLDS,
E. T. ALLING,
[L. S.] By B. F. ROCKAFELLOW,
Secretary.

Upon which is endorsed the following:

STATE OF COLORADO, } ss.
COUNTY OF FREMONT. }

James Clelland, A. A. Robinson, M. N. Mcgrue, F. A. Raynolds and E. T. Alling, the sureties, whose names are subscribed to the above undertaking, being severally duly sworn, each for
19 himself, says: "I am worth the sum in said undertaking specified as a penalty thereof, over and above all my just debts and liabilities, exclusive of property exempt from execution.

Subscribed and sworn to before me this nineteenth (19) day of April, A. D. 1878.
[L.S.] FRED H. SKEELE, Notary Public.

And upon which undertaing is also endorsed:
This bond taken and approved this 19th day of April, A. D. 1878
[L S.] R. A. BAIN, County Judge.

And upon which is also endorsed:
1878, April 20th, filed. JOHN WILSON,
Clerk District Court.

ORDER FOR WRIT OF INJUNCTION.

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And upon the said 20th day of April, A. D. 1878, an order directing a writ of injunction to issue, and attached to said complaint, was filed, which is as follows, viz :

ORDER FOR WRIT OF INJUNCTION.

The within bill of complaint being presented to me in the absence of the Judge of the District Court of Fremont county, in the Third Judicial District of Colorado, and I, the Judge of the County Court of said county, having required an undertaking in the sum of one thousand dollars, to be executed with sufficient security, payable to the defendant, and I, as such Judge, having taken
21 and approved said bond, it is accordingly ordered that the writ prayed for in the plaintiff's bill of complaint be issued, and the Clerk of the District Court of said county is so ordered upon the filing of said complaint, there appearing to me sufficient ground for the issuance of the same set forth in said complaint.

[L. S.] R. A. BAIN,
County Judge.

And afterwards, on the same day, to-wit: April 20th, A. D. 1878, a summons issued out of said court in said action, which is in the words and figures following:

22 STATE OF COLORADO, }
COUNTY OF FREMONT. } ss.

In the District Court within and for the county of Fremont, in the Third Judicial District of Colorado.

SUMMONS.

FOLIO

THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY—*Plaintiff*,
—versus—
THE DENVER AND RIO GRANDE RAILWAY COMPANY—*Defendants*.
} *Summons.*

The people of the State of Colorado send greeting: To the Denver and Rio Grande Railway Company, the defendant above named:

23 You are hereby required to appear in an action brought against you by the above named plaintiff in the District Court of Fremont county, in the Third Judicial District of Colorado, to answer the complaint filed in said District Court, in said county of Fremont, within ten days, exclusive of the day of service, if served within this county; if served out of this county, but in said Judicial District, within twenty days: otherwise within forty days; or judgment by default will be taken against you according to the prayer of said complaint. The said action is brought to restrain
24 you, officers, agents, surveyors, engineers, contractors, and employees, and each of them, and every of them, and all others acting in aid or assistance of them, from locating a railroad by survey upon the line of plaintiff's road, or any part thereof, and from in any manner destroying the grade of plaintiff's road already located, or any part thereof, as stated in the said complaint, and from in any manner disturbing the rights of plaintiff as acquired.

You are hereby notified that if you fail to appear and answer the said complaint as above
25 required, the said plaintiff will take judgment against you, according to the prayer of said complaint, and apply for the relief demanded therein.

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Given under my hand and the seal of the District Court within and for the said county of Fremont, this 20th day of April, A. D. 1878.

[L. S.] JOHN WILSON, Clerk.

Upon which Summons is endorsed:

STATE OF COLORADO, } ss.
COUNTY OF FREMONT. }

I do hereby certify that I received the within summons on the 20th day of April, 1878, and served the same by delivering a true copy thereof to W. F. Weitbrec, the Treasurer of the Denver
26 and Rio Grande Railway Company, at Cañon City in said Fremont county, this 22d day of April, 1878. B. F. SHAFFER, Sheriff.

1878, April 22d, filed.

JOHN WILSON, Clerk.

And on the same day, to wit: April 20th, 1878, a writ of injunction issued out of said court in said action, according to the prayer of the complaint therein, which said writ is yet in the hands of the sheriff of said county.

JOHN WILSON, Clerk.

And on the 22d day of April, A. D. 1878, the defendants in said action filed, in the office of the clerk of said court, their petition, which is in the words and figures following, to wit:

27 STATE OF COLORADO, } ss.
FREMONT COUNTY. }

In the District Court within and for the said county of Fremont.

PETITION FOR REMOVAL.

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THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY—*Plaintiff*,
—versus—
THE DENVER AND RIO GRANDE RAILWAY COMPANY—*Defendant*.

To the Honorable, the said District Court:

Your petitioner respectfully shows to this honorable court that the matter and amount in dispute in the above entitled suit exceeds, exclusive of costs, the sum or value of five hundred dollars.

28 That the suit is one arising under the laws of the United States, in this, to wit: that heretofore, to wit, on the 27th day of October, A. D. 1870, your petitioner became incorporated under and in pursuance of the laws of Colorado, by the several certificates of one William J. Palmer, one Alexander C. Hunt, and one William H. Greenwood, duly acknowledged before one William H. Townsend, a notary public in and for the county of Arapahoe, in said Territory, filed in the office of the Secretary of said Territory, and on or about the same day filed in the office of the County Clerk and Recorder in each of the counties of Arapahoe,

29 Douglas, El Paso, Pueblo, Fremont, Huerfano, Las Animas, Saguache, Conejos, Costilla and other counties of said Territory, in and by which it was declared among other things that they, the said Palmer, Hunt and Greenwood, desired to form a company and to become a body corporate under and by virtue of the provisions of chapter eighteen (18) of the Revised Statutes of the Territory of Colorado, for the objects and purposes therein set forth.

That the name of said company should be The Denver and Rio Grande Railway Company.

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30 That its object was to locate, construct, operate and maintain among other railways therein mentioned the Denver and Rio Grande Railway, the route whereof was described therein as follows:

Commencing at Denver, Colorado Territory, thence running up the valley of the South Platte river on the southeast side thereof to a point at or near the mouth of Plum creek; thence up the valley of Plum creek to a point at or near the forks of East Plum creek and West Plum creek; thence up the main east branch of Plum creek

31 valley to the lake in Township Eleven (11), range sixty-seven (67) west, on the crest of the ridge dividing the waters of Plum creek and Monument creek; thence down the valley of the Monument creek to a point at or near the junction of the valleys of the Monument and Fontaine qui Bouille, or to a point in the Fontaine valley below the mouth of the Monument, if the detailed surveys shall determine the latter to be most eligible; thence by the valley of the Fontaine or across its west tributaries to such a point on the Arkansas river at or above Pueblo, as may be found upon a

32 detailed survey to be the most eligible for intersecting the same; thence up the valley of the Arkansas river to a point at or near Cañon City; thence continuing up the valley of the Arkansas, through the Big Cañon of the same, to a point at or near the mouth of the South Arkansas river; thence by the valley or adjoining slopes of the South Arkansas river and of the Poncho creek to the summit of the divide between the waters of the Arkansas and the San Luis Park, known as Rancho Pass; thence, by the most eligible route in a general southerly direction down the San

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33 Luis valley to the valley of the Rio Grande del Norte; thence in a general southerly direction by the particular route which may be determined upon a detailed survey to be the most eligible down the valley of the Rio Grande to the southern boundary of Colorado; thence continuing down the valley of the Rio Grande, on either side of the river as may be found expedient, or crossing from one side to the other when desirable, to El Paso, in the State of Chihuahua, with the privilege of consolidating or uniting with and operating any connecting railway in the Republic of Mexico.

34 Your petitioner further shows that by the certain act of Congress, entitled "An act granting the right of way through the public lands to the Denver and Rio Grande Railway Company," approved June 8th, A. D. 1872, it was enacted, among other things, that the right of way over the public domain, one hundred feet in width on each side of the track, together with such other public lands adjacent thereto as might be needed for depots, shops and other buildings for railroad purposes, and for yard room and side tracks, not exceeding twenty acres at any one station, and

35 not more than one station in every ten miles, and the right to take from the public lands adjacent thereto, stone, lumber, earth, water and other material required for the construction and repair of its railway and telegraph line, be and the same are hereby granted and confirmed to your petitioner by its corporate name aforesaid, its successors and assigns; and in and by the said act it was and is further provided that all the rights, powers and franchises conferred by the laws of said Ter-

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ritory of Colorado, on corporations created under them for constructing and operating railroad and telegraph lines, were thereby ratified and confirmed to your petitioner.

36 Your petitioner shows that no conditions were, by the said act, imposed upon your petitioner in respect of the rights, right of way, privileges and franchises thereby granted and confirmed, or in respect of any of them, except that your petitioner should complete its railway to a point on the Rio Grande, as far south as Santa Fe, within five years from the passage of said act, and should complete fifty miles additional south of said point in each year thereafter; in default whereof it was in said act provided the rights and privileges therein granted should be null and void, so far as re-

37 spected the unfinished portions of said road.

That by the certain act of Congress, approved March 3d, A. D. 1877, entitled "An act to amend an act entitled an act granting the right of way through the public lands to the Denver and Rio Grande Railway Company," approved June 8th, 1872, the period of time mentioned in said first mentioned act was extended to ten years from the date of said act.

Petitioner shows that it hath always complied in all things with the provisions of the laws of the Territory of Colorado, under which it was or-

38 ganized, and with the provisions of the acts of Congress aforesaid, and relying upon the rights, right of way and privileges therein granted, and especially upon the right of way through the said cañon, granted by the said act of Congress first before mentioned, hath heretofore, proceeding with all reasonable diligence, constructed its

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road upon the route mentioned in its articles of incorporation aforesaid, from the city of Denv in the county of Arapahoe aforesaid, to Cañon City, in said Fremont county.

That at the date of the act of Congress first hereinbefore mentioned, the articles of association
39 of your petitioner were matters of record in the several counties hereinbefore mentioned, of the Territory of Colorado, and in the office of the Secretary of said Territory; and the route of your petitioners' railroad, as in said articles defined, well known to the Congress and President of the United States and the members of the said Congress, that at the date of the said act of Congress first herein mentioned, the Big Cañon of the Arkansas river, in the articles of association of your petitioner mentioned, was and still is, through its whole length, in and upon the public lands of the United States, and the lands whereon
40 the same is, and the lands on both sides of said Arkansas river and said cañon, through the whole length of said cañon, still are public lands belonging to the United States; that said cañon then was and still is, for about the distance of three miles thereof, not more than twenty-four feet in width—all which matters were well known to the Congress and the President of the United States at the date of the act first herein mentioned. And your petitioner claims that by virtue of said act of Congress it acquired the right to build and construct its railway through said cañon, and to occupy the said
41 cañon to the exclusion of any other railway; and that such route was and is conditional only upon its observance of the provisions of said act of Congress.

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That in virtue of the said act of Congress, your petitioner, in the year eighteen hundred and seventy-three, surveyed and located its said railway through the said Big Cañon of the Arkansas, and graded the same at various points upon the route so surveyed and located, and hath lately commenced to complete its said railway from Cañon City, in Fremont county aforesaid, through the Big Cañon of the Arkansas aforesaid.

42 That the plaintiff in the above entitled suit hath exhibited in this honorable court its complaint herein against your petitioner, claiming that it, the said plaintiff, is likewise a railway company, authorized to construct a railway from Cañon City aforesaid through the said cañon to a point known as South Arkansas postoffice, in Lake county in said State, and in and by its complaint aforesaid, the said plaintiff avers that in the year eighteen hundred and seventy-seven it located, by surveys, the line of its railway aforesaid, and marked its location by stakes, and proceeded
43 with all practicable diligence to construct its said railroad by grading the same at various points.

That maps and plats of the line of its said road as proposed, have been filed in the proper offices, and that by virtue of the acts of Congress it has acquired the right of way one hundred feet in width on each side of the centre of the track of their said proposed line, and are legally possessed thereof.

And that your petitioner, who is made defendant in said complaint, has begun to locate a line
44 of railway on the located line of it, the said plaintiff, at the entrance of said Big Cañon of the Ar-

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kansas, and at other points on plaintiffs' said location.

That defendant hath crossed the plaintiffs' said grade, and hath located its stakes on the graded bed of plaintiffs' road, and is threatening to at once complete its said road without regard to the rights of said plaintiff. And in and by its said complaint, the plaintiff prays an injunction to restrain your petitioner from continuing the construction of its said railway, and from, in any
45 way, interfering with the plaintiffs' said road or right of way, as the same is located and staked one hundred feet on each side of the centre of the track thereof.

Your petitioner therefore shows that the matter and question in controversy in this suit is the intent, meaning and effect of the act of Congress first hereinbefore mentioned, and what act or acts, if anv, were necessary to be done by your petitioner to entitle it to have and retain the right to construct its railway through said cañon of the
46 Arkansas, and whether by any subsequent act of Congress the right of way of your petitioner through said cañon was or is taken away or impaired. And whether bythe act of Congress, entitled "An act granting to railroads the right of way through the public lands of the United States," approved March the 3d, A. D. 1875, the said plaintiff is entitled to exclude your petitioner from the way and right of way one hundred feet in width on each side of the centre of its track.

And your petitioner offers herewith a bond with good and sufficient surety for its entering in said Circuit Court of the Unitsd States on the first

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day of its next session a copy of the record in
47 this suit, and for paying all costs that may be awarded by said Circuit Court if said court shall hold that this suit was wrongfully or improperly removed thereto.

And it prays this honorable court to proceed no further herein except to make the order of removal required by law, and to accept the said surety and bond, and to cause the record herein to be removed into said Circuit Court of the United States in and for the District of Colorado. And it will ever pray.

HANSON A. RISLEY,
Attorney for Petitioner.

48 STATE OF COLORADO, }
EL PASO COUNTY, } ss.

I, Hanson A. Risley, being duly sworn, do say that I am attorney for the petitioner in the above entitled cause; that I have read the foregoing petition and know the contents thereof, and that the statements and allegations therein contained are true as I verily believe.

HANSON A. RISLEY.

Subscribed by the said Hanson A. Risley in my presence, and by him sworn to before me this 22d day of April, A. D. 1878.

[L.S.] GEORGE SUMMERS,
Notary Public.

49 *To John Wilson, Esq., Clerk District Court, Fremont County:*

SIR—Under the act of Congress of March 3d, 1875, on the filing of this petition, with bond and

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55 in the said Circuit Court of the United States on the first day of its next session a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by the said Circuit Court of the United States if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void: otherwise in full force and virtue.

In testimony whereof the said Denver and Rio Grande Railway Company has executed this instrument by Hanson A. Risley, its solicitor duly authorized; and the said David C. Dodge and William W. Borst have also executed the same by subscribing their respective names and affixing their seals thereto, this 22d day of April, A. D. 1878.

The Denver and Rio Grande Railway Company,———————————— [L. S.]
By HANSON A. RISLEY, Solicitor.

[L. S.] DAVID C. DODGE. [L. S.]
W. W. BORST. [L. S.]

Attest: WM. WAGNER,
Secretary.

Upon which bond is endorsed the following:

STATE OF COLORADO, } ss.
COUNTY OF EL PASO. }

On this 22d day of April, A.D. 1878, personally appeared before me the undersigned, Hanson A. Risley, the Solicitor, and William Wagner, the Secretary of the Denver and Rio Grande Railway Company, known to me to be the persons described in, and who executed, the foregoing bond, and acknowledged that they executed the same,

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and attested the said bond, as the act and on behalf of the said company.

[L. S.] GEORGE SUMMERS,
Notary Public.

57 STATE OF COLORADO, } ss.
COUNTY OF FREMONT. }

I hereby certify that the foregoing bond was this day filed in my office, and that the same is hereby approved.

Witness my hand and the seal of the District Court of said county this 22d day of April, A. D. 1878.

[L. S.] JOHN WILSON, Clerk.

STATE OF COLORADO, } ss,
COUNTY OF EL PASO. }

William Wagner of Colorado Springs, in said county, being duly sworn, says he is the Secretary of the Denver and Rio Grande Railway Company; that Hanson A. Risley, who signed and executed the foregoing bond in the name and on
58 behalf of the said company, is the solicitor of the said company; that the impression of the seal made by deponent in attesting the foregoing bond, purporting to be an impression of the corporate seal of the said company, is an impression of the said corporate seal.

WM. WAGNER.

Subscribed and sworn to before me, this 22d day of April, A. D. 1878.

[I. S.] GEORGE SUMMERS,
Notary Public.

ORDER.—TIME TO DEMUR.

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STATE OF COLORADO, } ss.
COUNTY OF FREMONT. }

I, John Wilson, Clerk of the District Court of the Third Judicial District of the State of Colorado, within and for the county aforesaid, do hereby certify that the foregoing pages contain a
59 full, true and perfect copy of all the papers filed in said court in the action of the Cañon City and San Juan Railway Company versus the Denver and Rio Grande Railway Company.

Given under my hand and the seal of said District Court, at Cañon City in said county, this 22d day of April, A. D. 1878.

[L. S.] (Signed) JOHN WILSON, Clerk.

STATE OF COLORADO, } ss.
FREMONT COUNTY. }

In the District Court of said county.

THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY—*Plaintiff*,
—versus—
THE DENVER AND RIO GRANDE RAILWAY COMPANY—*Defendant*.

60 At this day, on motion of Thomas Macon, Esq., who for the defendant appears specially for the purpose of this motion only, it is ordered for satisfactory cause shown that the time for defendant to demur or answer herein be extended to thirty days from this date on condition the defendant is to pay the costs of the attempted transfer.

(Signed) J. H. HENRY, Judge.

May 1st, 1878.

ORDER.—TIME TO DEMUR.

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Upon which order is endorsed:

"1878, May 2d, filed. JOHN WILSON,
Clerk."

COPY.

STATE OF COLORADO, } ss.
COUNTY OF FREMONT. }

In the District Court within and for the said county of Fremont.

THE CAÑON CITY AND SAN JUAN RAILROAD COMPANY—*Plaintiff*,
—versus—
THE DENVER AND RIO GRANDE RAILWAY COMPANY—*Defendant*.

To the Honorable, the said District Court:

The petition of the Denver and Rio Grande Railway Company respectfully shows to this Honorable Court that the matter and amount in dispute in the above entitled cause exceeds, exclusive of costs, the sum or value of five hundred dollars.

That the suit is one arising under the laws of the United States, in this, to-wit, that heretofore, to-wit, on the 27th day of October A. D. 1870, your petitioner became incorporated under and in
62 pursuance of the laws of Colorado, by the several certificates of one William J. Palmer, one Alexander C. Hunt, and one William H. Greenwood, duly acknowledged before one William H. Townsend, a Notary Public in and for the county of Arapahoe, in the then Territory of Colorado, filed in the office of the Secretary of the said Territory, and on or about the same day filed in the office of the County Clerk and Recorder in each of the counties of Arapahoe, Douglas, El Paso, Pueblo, Fremont, Huerfano, Las Animas,

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Saguache, Conejos, Costilla and other counties of
63 said Territory, in and by which it was declared among other things that they, the said Palmer, Hunt and Greenwood, desired to form a company and to become a body corporate, under and by virtue of the provisions of Chapter Eighteen (18) of the Revised Statutes of the Territory of Colorado, for the objects and purposes therein set forth.

That the name of said company should be the Denver and Rio Grande Railway Company.

That its object was to locate, construct, operate and maintain, among other railways therein men-
64 tioned, the Denver and Rio Grande Railway, the route whereof was described therein as follows: "Commencing at Denver, Colorado Territory, thence running up the valley of the South Platte river, on the southeast side thereof, to a point at or near the mouth of Plum creek; thence up the valley of Plum creek to a point at or near the forks of East Plum creek and West Plum creek; thence up the main east branch of Plum creek valley, to the lake in township Eleven, (11) range
65 sixty-seven (67) west, on the crest of the ridge dividing the waters of Plum creek and Monument creek; thence down the valley of the Monument creek, to a point at or near the junction of the valleys of the Monument and the Fountaine qui Bouille, or to a point in the Fountain valley below the mouth of the Monument, if the detailed surveys shall determine the latter to be most eligible; thence by the valley of the Fountain, or across its west tributaries, to such a point on the Arkansas river, at or above Pueblo, as may
66 be found upon a detailed survey to be the

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most eligible for intersecting the same; thence up the valley of the Arkansas river to a point at or near Cañon City; thence continuing up the valley of the Arkansas through the Big cañon of the same to a point at or near the mouth of the South Arkansas river; thence by the valley or adjoining slopes of the South Arkansas river and of the Poncho creek to the summit of the divide between the waters of the Arkansas and the San Luis
67 Park, known as Poncho Pass; thence by the most eligible route in a general southerly direction down the San Luis valley to the valley of the Rio Grande Del Norte; thence in a general southerly direction, by the particular route which may be determined upon a detailed survey to be the most eligible, down the valley of the Rio Grande, to the southern boundary of Colorado; thence continuing down the valley of the Rio Grande, on either side of the river, as may be found expedient, or crossing from one side to the other, when desirable, to El Paso, in the State of
68 Chihuahua, with the privilege of consolidating or uniting with and operating any connecting railway in the Republic of Mexico."

Your petitioner further shows that by the certain act of Congress, entitled "An act granting the right of way through the public lands to the Denver and Rio Grande Railway Company," approved June 8th, A D. 1872, it was enacted, among other things, that the right of way over the public domain one hundred feet in width on each side of the track, together with such other public lands adjacent thereto, as might be needed for
69 depôts, shops and other buildings for railroad purposes, and for yard room and side tracks, not

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exceeding twenty acres, at any one station, and not more than one station in every ten miles, and the right to take from the public lands adjacent thereto, stone, lumber, earth, water and other material required for the construction and repair of its railway and telegraph line, be and the same are hereby granted and confirmed to your petitioner by its corporate name aforesaid, its successors and assigns; and in and by the said act it

70 was and is further provided that all the rights, powers and franchises conferred by the laws of said Territory of Colorado, on corporations created under them, for constructing and operating railroad and telegraphing lines were thereby ratified and confirmed to your petitioner.

Your petitioner shows that no conditions were, by the said act, imposed upon your petitioner in respect of the rights, right of way privileges and franchises thereby granted and confirmed, or in

71 respect of any of them, except that your petitioner should complete its railway to a point on the Rio Grande as far south as Santa Fé, within five years from the passage of said act, and should complete fifty miles additional south of said point in each year thereafter—in default whereof it was in said act provided the rights and privileges therein granted should be null and void, so far as respected the unfinished portions of said road.

That by the certain act of Congress, approved March 3d, 1877, entitled "An act to amend an

72 act entitled an act granting the right of way through the public lands to the Denver and Rio Grande Railway Company," approved June 8th, 1872, the period of time mentioned in said first mentioned act was extended to ten years from the date of said act.

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Petitioner shows that it hath always complied in all things with the provisions of the laws of the Territory of Colorado, under which it was organized, and with the provisions of the acts of Congress aforesaid, and relying upon the rights,
73 right of way and privileges therein granted, and especially upon the right of way through the said cañon granted by the said act of Congress, first before mentioned, hath heretofore, proceeding with all reasonable diligence, constructed its road upon the route mentioned in its articles of incorporation aforesaid, from the city of Denver, in the county of Arapahoe aforesaid, to Cañon City, in said Fremont county.

That at the date of the act of Congress first hereinbefore mentioned, the articles of association of your petitioner were matter of record in the
74 several counties hereinbefore mentioned, of the Territory of Colorado, and in the office of the Secretary of said Territory, and the route of your petitioners' railroad, as in said articles defined, were known to the Congress and President of the United States, and the members of the said Congress. That at the date of the said act of Congress first herein mentioned, the Big Cañon of the Arkansas river, in the articles of association of your petitioner mentioned, was, and still is, through its whole length, in and upon the public lands of the
75 United States, and the lands whereon the same is, and the lands on both sides of said Arkansas river and said cañon, through the whole length of said cañon, still are public lands belonging to the United States. That said cañon then was, and still is, for about the distance of one and one-half miles thereof, not more than about forty-five

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feet in width; all which matters were well known to the Congress and the President of the United States at the date of the act first herein mentioned.

76 And your petitioner claims that by virtue of said act of Congress it acquired the right to build and construct its railway through said cañon, and to occupy the said cañon to the exclusion of any other railway; and that such right was, and is, conditioned only upon its observance of the provisions of said act of Congress.

That in virtue of said act of Congress, your petitioner, in the year eighteen hundred and seventy-three, surveyed and located its said railway through the said Big Cañon of the Arkansas,

77 and graded the same at various points upon the route so surveyed and located, and hath lately commenced to complete its said railway from Cañon City, in Frement county aforesaid, through the Big Cañon of the Arkansas aforesaid.

That the plaintiff in the above entitled suit hath exhibited in this honorable court its complaint herein against your petitioner, claiming that it, the said plaintiff, is likewise a railway company, authorized to construct a railway from Cañon City aforesaid, through the said cañon to a point

78 known as South Arkansas post office, in Lake county in said state, and in and by its complaint aforesaid, the said plaintiff avers that in the year eighteen hundred and seventy-seven it located by surveys the line of its railway aforesaid, and marked its location by stakes, and proceeded with all practicable diligence to construct its said railroad by grading the same at various points.

That maps and plats of the line of its said road as proposed have been filed in the proper offices,

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and that by virtue of the acts of Congress it has
79 acquired the right of way one hundred feet in width on each side of the centre of the track of their said proposed line, and are legally possessed thereof.

And that your petitioner, who is made defendant in said complaint, has begun to locate a line of railway on the located line of it, the said plaintiff, at the entrance of said Big Cañon of the Arkansas, and at other points on plaintiff's said location.

That defendant hath crossed the plaintiff's said grade and hath located its stakes on the graded
80 bed of plaintiff's road and is threatening to at once complete its said road without regard to the rights of said plaintiff.

And in and by its said complaint the plaintiff prays an injunction to restrain your petitioner from continuing the construction of its said railway, and from in any way interfering with the plaintiff's said road or right of way as the same is located and staked one hundred feet on each side of the centre of the track thereof.

Your petitioner further shows that the said Cañon City and San Juan Railway Company
81 neither claims to have nor hath any grant of said right of way, nor any license or authority from your petitioner for the construction of its said railroad.

Your petitioner therefore shows that the matter and question in controversy in this suit is the intent, meaning and effect of the act of Congress first hereinbefore mentioned, and what act or acts, if any, were necessary to be done by your petitioner to entitle it to have and retain the right to

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construct its railway through said Cañon of the
82 Arkansas, and whether by any subsequent act of Congress, the right of way of your petitioner to said cañon was or is taken away or impaired. And whether by the act of Congress entitled "An act granting to railroads the right of way through the public lands of the United States," approved March 3, A. D. 1875, the said plaintiff is entitled to exclude your petitioner from the way and right of way, one hundred feet in width on each side of the centre of its track.

And your petitioner offers herewith a bond
83 with good and sufficient surety for its entering in said Circuit Court of the United States on the first day of its next session a copy of the record in this suit, and for paying all costs that may be awarded by said Circuit Court, if said court shall hold that this suit was wrongfully or improperly removed thereto.

And it prays this Honorable Court to proceed no further herein except to make the order of removal required by law and to accept the said surety and bond, and to cause the record herein
84 to be removed into the said Circuit Court of the United States, in and for the District of Colorado. And it will ever pray.

(Signed) HANSON A. RISLEY,
Attorney for Petitioner.

STATE OF COLORADO, }
ARAPAHOE COUNTY, } ss.

I, Hanson A. Risley, being duly sworn do say that I am attorney for the petitioner in the above entitled cause. That I have read the foregoing petition and know the contents thereof, and that

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the statements and allegations therein contained are true as I verily believe.

(Signed) HANSON A. RISLEY.

85 Subscribed by the said Hanson A. Risley in my presence, and by him sworn to before me, this thirtieth (30th) day of April, A. D. 1878.

[L. S.] (Signed) SAMUEL S. LANDON,
Notary Public.

Upon which petition is endorsed:

"I, the undersigned, find the within petition sufficient in form and substance for the purpose for removing said cause to the United States Circuit Court, as provided by law.

J. W. HENRY, Judge.

PUEBLO, COL., May 1st, 1878."

And also endorsed:

BOND.

"1878, May 2d, filed. JOHN WILSON, Clerk."

86 Know all men by these presents, that the Denver and Rio Grande Railway Company as principal, and Wm Wagner, Henry McAllister, Jr., as sureties, are held and firmly bound unto the Cañon City and San Juan Railway Company, in the penal sum of two thousand dollars, the payment whereof to be made to said, the Cañon City and San Juan Railway Company, its heirs, successors and assigns, we bind ourselves, our heirs, succcssors, representatives and assigns, jointly and severally, firmly by these presents; yet upon
87 these conditions: The Denver and Rio Grande Railway Company aforesaid, having petitioned the District Court of Fremont county, in the State of Colorado, for the removal of a certain cause

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therein pending, wherein the Cañon City and San Juan Railway Company aforesaid is plaintiff, and the Denver and Rio Grande Railway Company aforesaid defendant, to the Circuit Court of the United States in and for the district of Colorado.

Now, if said, the Denver and Rio Grande Rail-
88 way Company, petitioner, shall enter in the said Circuit Court of the United States, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States, if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void, otherwise in full force and virtue

In witness whereof, the Denver and Rio Grande Railway Company aforesaid hath caused its corporate seal to be affixed, and these presents to be subscribed by Hanson A. Risley, its General Solicitor, thereunto duly authorized and attested by William Wagner, its Secretary, and the said William Wagner and Henry McAllister, Jr., sureties, have set their hands and seals this 3d day of May A. D. 1878.

The Denver and Rio Grande Railway Company, by

HANSON A. RISLEY, [L. S.]
General Solicitor. [SEAL]

WM. WAGNER, [SEAL]

HENRY MCALLISTER. [SEAL]

89 [L. S.] Attest: WM. WAGNER,
Secretary.

BOND.

FOLIO

STATE OF COLORADO, } ss.
COUNTY OF PUEBLO. }

William Wagner, of Colorado Springs, being duly sworn, says he is the secretary of the Denver and Rio Grande Railway Company, that Hanson A. Risley who signed and executed the foregoing bond in the name and on behalf of the said company, is the solicitor of the said company; that the impression of the seal made by deponent in attesting the foregoing bond, purporting to be an impression of the corporate seal of the said company, is an impression of the said corporate seal.

WM. WAGNER.

Sworn to and subscribed before me this third day of May, A.D. 1878.

[L. S.] EDWARD HOME,
Notary Public.

STATE OF COLORADO, } ss.
COUNTY OF PUEBLO. }

Justification :

90 We, Wm. Wagner and Henry McAllister, Jr., sureties in the above bond, being severally duly sworn do depose and say, that we are residents of the State of Colorado, and are property holders therein, and are each worth the sum of two thousand dollars, over and above all his just debts and liabilities, and exclusive of property by law exempt from execution, that they each have property in the State of Colorado, liable to exe-

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cution of the value of more than two thousand dollars.

WM. WAGNER,
HENRY MCALLISTER, Jr.

91 Subscribed in my presence by William Wagner and Henry McAllister, Jr., and by them sworn to before me this third day of May, A.D. 1878.

[L. S.] EDWARD HOME,
Notary Public.

At a meeting of the directors of the Denver and Rio Grande Railway Company, duly held at their office in Colorado Springs, Colorado, on the 22d day of April, A.D. 1878, it was on motion of Charles B. Lamborn,

"*Resolved*, That the President, Vice-President, Treasurer or Solicitor, or either of them, be authorized to execute and deliver in the name and
92 on behalf of the company, any appeal bond, supersedeas bond, injunction bond, replevin bond, attachment bond, forthcoming bond, bond for the removal of any cause to the federal courts, or any other bond or undertaking which may to such officer or solicitor seem to be necessary or proper, in any suit in which the company is or may be a party, and to affix thereto a scrawl as and for the seal of the company, and that the secretary be authorized to attest any such bond or undertaking by affixing thereto the corporate seal of the company.

STATE OF COLORADO, }
COUNTY OF PUEBLO, } ss.

93 William Wagner, being first duly sworn, says on oath that he is secretary of the Denver and Rio Grande Railway Company, and that the foregoing

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is a true copy of a resolution passed at a meeting of the board of directors of said company, duly assembled at Colorado Springs in El Paso county in said state, on the 22d day of April, A D. 1878.

WM. WAGNER.

Subscribed and sworn to before me this third day of May, 1878.

[L. S.] EDWARD HOME,
Notary Public.

ORDER, BOND APPROVED.

94 On application of the Denver and Rio Grande Railway Company to me, to fix the amount of the penalty of the bond for the removal of the cause of the Cañon City and San Juan Railway Company vs. The Denver and Rio Grande Railway Company, to the Circuit Court of the United States for the District of Colorado, I fixed the same at two thousand ($2,000) dollars, and on this third day of May, A. D 1878, the said Denver and Rio Grande Railway Company having executed the within bond and offered the same to me I do hereby accept the same, and approve the sureties therein.

(Signed) J. W. HENRY, Judge,

Third Judicial District, State of Colorado.

Upon the back of which said bond is endorsed: "1878, May 3d, filed.

(Signed) JNO. WILSON, Clerk."

ORDER, REFUSING TO HEAR APPLICATION FOR REMOVAL.

95 STATE OF COLORADO, } ss.
FREMONT COUNTY. }

In the District Court thereof.

ORDER—REFUSING REMOVAL.

FOLIO

THE CAÑON CITY AND SAN JUAN RAILROAD COMPANY
—versus—
THE DENVER AND RIO GRANDE RAILWAY COMPANY.

Upon the application of the defendant this 1st day of May, 1878, for the removal of this cause to the Circuit Court of the United States for the District of Colorado, it having been made to appear by a certified copy of certain proceedings had before the Honorable Robert A. Bain, County
96 Judge of Fremont County, that certain officers and employees of the said defendant, had, after sufficient affidavits filed therefor, been arrested for alleged violations of the injunction issued out of the District Court of Fremont county in this cause on the twentieth day of April, 1878, and after a proper hearing, that the parties so arrested had failed to purge themselves of the said contempt, and it appearing by the affidavits of Mahlon D. Thatcher, J. E. Custer, W. R. Morley,
97 A. Harly, James H. Johnson, James Gallashos and A. A. Robinson that there have been frequent and contemptous violations of the said writ, the court for reasons of the alleged contempt refuses to hear the said application for removal.

J. W. HENRY, Judge.

Upon which said order is endorsed:

"1878, April 3d (6 p. m.), filed.

JNO. WILSON, Clerk."

STATE OF COLORADO, } ss.
COUNTY OF FREMONT. }

I, John Wilson, Clerk of the District Court of the Third Judicial District of said state, within and for the county aforesaid, do hereby certify

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that the foregoing pages contain a full, true and
98 perfect copy of all the papers and orders filed in the cause of the Cañon City and San Juan Railway Company versus the Denver and Rio Grande Railway Company, excepting second bond on application for removal.

Witness my hand and the seal of said court, this 3d day of May, A. D. 1878.

Seal. District Court, Fremont County.

(Signed) JOHN WILSON, Clerk.

Endorsed:

No. 155.—Circuit Court, United States. The Cañon City and San Juan Railway Company versus the Denver and Rio Grande Railway Company. From District Court, Fremont County. For injunction and other relief. Filed May 4, A. D. 1878.

(Signed) EDWARD F. BISHOP, Clerk.
By HENRY SPARNICK, Deputy.

99 And afterwards and on this same day came again the said defendant in the above entitled cause, by H. A. Risley, Esq., its solicitor, and filed in said court and in said cause its motion to annul the injunction heretofore issued in the said District Court within and for the County of Fremont, and the said motion is in words and figures as follows, to-wit:

MOTION TO ANNUL INJUNCTION.

FOLIO

THE UNITED STATES OF AMERICA,
DISTRICT OF COLORADO.

In the Circuit Court for said district. Of the July Term, A. D. 1878.

THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY—*Plaintiff*,
—versus—
THE DENVER AND RIO GRANDE RAILWAY COMPANY—*Defendant*.

100 At this day comes the said defendant, by Hanson A. Risley, its solicitor, and, for the purposes of this motion only, moves the court here to annul and declare for naught the certain pretended injunction writ lately issued in this cause from the District Court of, within and for the County of Fremont in the State of Colorado, before the removal hereof out of said District Court.

And for cause of this motion shows to the court here:

I. That no equity to entitle plaintiff to said injunctive relief is shown in and by the complaint or bill of complaint filed herein, and whereon said pretended writ was awarded.

101 II. The said complaint is not verified as required by law.

III. The said complaint is not sworn by any officer of the said plaintiff having authority to make such verification

IV. The affidavit appearing at the foot of said complaint doth not purport to be made by any person having knowledge of the contents of said complaint, nor of the truth of said contents.

V. No such bond as required by law as a condition to the issuing of the writ of injunction hath ever been given herein.

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VI. The said pretended injunction writ was issued by the clerk of the District Court of the
102 County of Fremont and State of Colorado, on the pretended authority of an order made by the county judge of said county, when, by the laws of the State of Colorado, the county judge hath no authority to allow or award a writ of injunction in a cause pending or to be brought in the District Court.

VII. The said pretended injunction writ was issued out of the District Court of said Fremont county on the pretended order of the County Judge of Fremont county, and it doth not appear that the alleged cause of action arose in the said county of Fremont.

(Signed) H. A. RISLEY,
Pet'r. Solicitor.
WELLS, SMITH & MACON,
Of Counsel.

Endorsed:

No. 155—Circuit Court—District of Colorado. The Cañon City and San Juan Railway Company vs. The Denver and Rio Grande Railway Company. Motion to annul injunction issued out of Fremont District Court. Filed May 4th, A. D. 1878.

(Signed) EDWARD F. BISHOP, Clerk.
By HENRY SPARNICK, Deputy.
H. A. RISLEY & WELLS, SMITH & MACON,
For Defendants.

103 And on the same day came the said complainant, in the above entitled cause, by C. E. Gast, Esq., its Solicitor, and filed in said court and in said cause its motion to remand this said cause to the

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the justices of said court, at chambers, in the city of Denver, came the said plaintiff, by Chas. E. Gast, its solicitor, and the said defendant, by Hanson A. Risley, its solicitor, also came; and this cause coming on to be heard, upon the motion of the plaintiff for leave to file an amended bill, and for a preliminary injunction pursuant to the prayer of its amended bill to be filed herein, was argued by counsel, as well on the part of the

108 plaintiff, as the said defendant, and it being alleged in plaintiff's bill that under and in pursuance of an act of the Legislative assembly of Colorado, entitled "corporations" and acts amendatory thereto, the said plaintiffs had become, and was a duly incorporated company, for the purpose of constructing and operating a railroad from Cañon City, in the State of Colorado, up the Arkansas river, through the Grand cañon of said river to the South Arkansas postoffice, in Lake county, in said state, and that the said plaintiff did within twelve months after such incorporation procure the said line to be surveyed, and staked,

109 and platted, and that said plat for a distance of twenty miles had been approved by the Secretary of the Interior, and noted on the plat of land in the proper land office, and that by virtue of such incorporation survey, location and platting, and approval of said line it had become entitled to a right of way over said line for one hundred feet on each side of the center line of said track, together with the right to take material timber and stone from the adjoining lands, to-wit, the public domain of the United States not reserved from sale, and not belonging to any park or mili-

110 tary reservation, and it appearing that the said de-

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fendant was also claiming a right of way over the same route, and through the said Grand cañon of the said Arkansas river, and that said plaintiffs, while endeavoring to construct and complete their said railroad over said line, had been obstructed and hindered by said defendant and its employees, and that said defendant was threatening to do, and were about to do acts, that were unlawful, and which would result in irreparable

111 injury to the said plaintiff, and it appearing that there is danger of irreparable injury to the said plaintiff from delay, it is therefore ordered that the said plaintiff have leave to file its amended bill in this behalf, and that said defendant, its officers, agents, attorneys, engineers and employees be restrained and enjoined until the further order of one or more of the Judges of this court, from occupying, or attempting to occupy, the said Grand cañon of the Arkansas, and from in any way or manner constructing, or attempting to construct, survey or locate their line of railroad through the said cañon, and from in any way or

112 manner aiding, abetting others to do any of those things.

And upon inquiry touching the bounds of said cañon, it seemeth to the said Justice, and it is ordered that for the purposes of this suit the said cañon be taken and deemed to begin at what is known as the "Point of Rocks," at the mouth of said Grand Cañon, and about two miles above the village of Cañon City, and to extend and continue thence up the Arkansas river, following the course of the river to a point one half mile above the wagon bridge over said river, known as the Mc-

113 Candless, or twelve-mile bridge.

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It is further ordered that on the said plaintiffs giving bond to said defendant, with sureties satisfactory to the said Justice, in the penalty of twenty thousand dollars, conditioned to make good to the defendant all damages which it may sustain by reason of said injuntion in case the same be dissolved, a preliminary injunction issue restraining the said defendant, its officers, agents and servants, attorneys, engineers, from doing or attempting the wrongs aforesaid, or any of them, or aiding, abetting or encouraging others so to do, until other order shall be made in the premises.

114 Ordered that the bond of William B. Strong and Mahlon D. Thatcher shall be taken as plaintiffs' bond for the purposes above mentioned, conditioned as aforesaid, and made for and on behalf of said plaintiffs.

And afterwards and on the same day, to-wit, May 9th, A.D. 1878, came again the said complainant, by C. E. Gast, Esq., its solicitor, and filed in said court and in said cause, its amended bill of complaint: and the said amended bill of complaint, in words and figures as follows, to-wit:

AMENDED BILL OF COMPLAINT.

FOLIO

115 THE UNITED STATES OF AMERICA,
STATE OF COLORADO.

In the Circuit Court of the United States for the District of Colorado.

THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY—*Plaintiff*,
—versus—
THE DENVER AND RIO GRANDE RAILWAY COMPANY—*Defendant*.

To the Judge of the Circuit Court of the United States for the District of Colorado:

The Cañon City and San Juan Railway Company, a corporation organized and existing under the laws of the State Colorado, and a citizen of the State of Colorado, brings this its amended bill
116 of complaint against the Denver and Rio Grande Railway Company, a corporation organized and existing under the laws and a citizen of same State of Colorado.

And, thereupon, your orator complains and says that your orator is now and ever since the 17th day of February, A. D. 1877, has been a body corporate, organized and existing under the laws of the State of Colorado, and doing business in the county of Fremont in said State. That your orator was duly incorporated under and by virtue of the general incorporation laws of the State of Colorado to wit: Chapter 18th, Revised Statutes
117 of Colorado and the acts amendatory thereto, that said incorporation was effected by the making, signing and acknowledging articles of incorporation, and by filing the same in the office of the Secretary of the State of Colorado and in the office of the County Clerk and Recorder of Fremont county and by filing its acceptance of the

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provisions of the general law of the State of Colorado as by law provided. A copy of said articles of incorporation is hereto attached and made a part of this your orator's bill, marked Exhibit "A."

Your orator further shows that by said
118 articles of incorporation aforesaid under and by virtue of which your orator became a body corporate the object and purpose of such incorporation is declared to be to construct, improve and maintain a railroad to carry passengers and freight between Cañon City, in the county of Fremont, and the point known as the South Arkansas Post-office, in the county of Lake, in the said State of Colorado, commencing at the company's depôt site, in Cañon City, to be hereafter selected; thence up the valley of the Arkansas river, through the Grand Cañon thereof; thence by the most practicable route following the Arkansas
119 river to the point known as the South Arkansas Post-office, in the county of Lake aforesaid, with full power and authority to buy lands and tenements and to receive the same by gift or demise for the successful, convenient and profitable running of the said railroad, and for depôts, side tracks and work-shops and for any and all other purposes that may be desirable or profitable, with full power to convey, alien, and encumber the same in whole or in part and to sell the stock of the company.

And your orator further represents that after
120 such organization, to wit: in the month of April, in the year A. D. 1877, your orator did, in pursuance of its said purpose of constructing and maintaining a railroad over the same route in

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said certificate mentioned, and to effectuate the purposes of said incorporation, did proceed to survey and locate the line of its said railroad over the said route so designated in said certificate, and did thereupon locate its said line by stakes at such distances on said line as should and did properly designate said line of said road, and did forthwith proceed, with all practicable diligence,
121 to the construction of said road on said line in said certificate mentioned, and staked as aforesaid by grading the said railroad at various points on the line so located as aforesaid. One of the points is at the entrance of the said Grand Cañon of the Arkansas, or near the said town of Cañon City, and the same grade has ever since then, and now is in the rightful possession of your orator for the purposes aforesaid.

Your orator further shows that it has fully and in all respects, and in good faith, complied with all the provisions of the laws of the State of Col-
122 orado relating to incorporations (that the stockholders of said company have paid in their proportion of stock subscribed by them, as required by law,) and that in the further prosecution of the purposes of your orator as set forth in its bill of incorporation, and to secure to itself the right of way and all other rights and privileges given and granted to corporations duly existing under and by virtue of a law of the United States, entitled "An act granting to railroads the right of way through the public lands of the United States," approved March 3d, 1875, your orator not only
123 made such survey and located the said line of its said road as aforesaid, but did thereupon cause to be made a plat and profile of said road, and did file the same with the Register of the land office,

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where such line and land is located, within twelve months after such survey of said line, and did also procure the approval of the said survey, plat and profile by the Hon. Carl Schurtz, Secretary of the Interior, as by said act of Congress required, and the said plat and profile was thereupon noted upon the plats of the said land office as by the said act of Congress required, and thereupon your orator
124 became and is entitled to, and has acquired a right of way one hundred feet on each side of the centre of the track over the said line of survey and plat of your orator's, and is now legally possessed thereof, together with the right to take from the public lands adjacent thereto material—earth, stone and timber—necessary for the construction of said road, and also grounds adjacent thereto, for depots, side tracks, etc., set forth in said act.

Your orator further shows that at the time of the survey, location and platting of the said line
125 of your orator's said road, the lands over which the same was located were public lands of the United States, and no part of it was within any military park or Indian reservation or other lands specially reserved from sale.

Your orator further shows that the said defendant, the Denver and Rio Grande Railway Company, claims to be a corporation existing under the laws of the State of Colorado, and that on or about the 19th day of April, A. D. 1878, and after your orator had taken possession of the said line of road in said certificate of incorporation described, and after the approval of its said plat
126 and profile, and after the said profile had been noted in the proper land office, and while your

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orator was in the actual possession of said line so surveyed, located and graded as aforesaid, the said Denver and Rio Grande Railway Company, defendant, did enter upon and invade the possession of your orator with a large number of men, servants and employees, and did then and there commence to throw down and destroy the graded portion of your orator's road bed, and did then and there wrongfully and maliciously, and with intent to injure your orator and to hinder and
127 delay it in its constructing its said road, and to prevent it from constructing the same, pull up and remove the stakes and grade pegs of your orator before that time set up and established by the surveyor and engineers of your orator, and did commence to establish a different grade from the one established by your orator for its said road bed, and are now threatening to remove the said grade pegs and stakes of your orator on its said line so surveyed and staked as aforesaid, and are threatening to take possession of the said line of your orator, and to exclude your orator and its
128 employees from said line.

Your orator further shows that its line so located as aforesaid is of the length of twenty miles, and for a part of said distance said line runs through what is known as the Grand Cañon of the Arkansas river; that the said cañon is very narrow and enclosed in precipitous rocks, and that the difficulties in the way of survey and establishment of a grade of a road through said cañon are very great, and that if the said defendants shall succeed in doing what they are now seeking and threatening to do, and which they
129 are actually attempting to do, your orator will be

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put to great expense and delay in establishing its line of location and in restoring the grade of its said road to the one already established.

Your orator further shows that it has now a large number of men employed, to-wit, several hundred men; that it is ready and anxious to proceed with all possible dispatch to the construction and operation of said road, and that if said defendant is allowed to proceed to destroy the said grade of said road now being constructed
130 by your orator and destroy and remove its said grade pegs and stakes, as it threatens to do, and as your orator believes it will do unless restrained by an order of this court, it will so hinder and delay the construction of your orator's said road over its said line that the same cannot be constructed during the season of 1878, as it would be if your orator was allowed to proceed as it is lawfully entitled to do.

Your orator further shows that the said defendant has in its employ a large number of men, and that these employees have been furnished with fire arms and ammunition, and said employees
131 are by the exhibition of such fire arms, accompanied with threats that they will shoot the servants and employees of your orator if they attempt to hold possession or work upon certain portions of the line of said road of your orator, preventing your orator and its servants and employees from working on certain parts of its said line of road, that the nature of said Grand Cañon through which the said line of said road is located is such that the said employees of the said defendant, and at the order and request of the said defendant by exhibiting fire arms, and threat-

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ening to shoot the employees of your orator are
132 preventing them from going up said cañon and from conveying to your orator's employees provision for those employees working for your orator above said narrow part of said Grand Cañon. And your orator further says that the said defendant threatens to continue to destroy the grade of your orator on said line, and to remove the stakes and grade pegs throughout the entire length of said cañon wherever your orator may construct such grades, and set up such stakes, and your orator believes it will continue to carry out such threats in all places where it can
133 by force of numbers, and threats so intimidate the workmen of your orator as to get possession of such grade.

And your orator further shows that the point so occupied and held by defendant and its employees is the narrowest part of said cañon, and where the greatest amount of labor is to be done, and where it will take the longest to construct the road, and that the defendant by holding and possessing the same by fire arms are preventing the employees of your orator from working in said different parts of said cañon.

134 Your orator further shows that in the nature of things it will be impossible to establish the damages your orator will suffer by reason of the said wrongful acts of the said defendant if it is allowed to proceed as it is now attempting to proceed, and as it threatens to continue to do; inasmuch as it cannot be adjudged how long delay it may cause or may have caused, nor what the traffic over such road would be during the time the delay may occur, nor how much

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more the construction of said road may cost by reason of the delay in causing the construction to
135 be carried on at an unfavorable season of the year.

And your orator further says that if the defendants are allowed to proceed as they are now doing, and threaten to continue to do, your orator will be put to a great expense in re-surveying said route, and in reconstructing its said grade as well as expenses caused by delays and hindrance of the work; and that said defendant is insolvent and unable to respond in damages, and that the said defendant has no property out of which any damages your orator may recover against the defendant in any suit that it may bring against it for the acts here complained of within
136 the State of Colorado, and that all the property, both real and personal, of the said defendant is already encumbered by trust deeds or mortgages to its full value, and your orator will suffer irreparable injury if said defendant is not restrained by the order of this court.

Your orator further shows that the said defendant has never acquired any right of way over the said line of your orator, and has no right to occupy or possess the same line, and its attempt so to do is in violation of the rights of your orator.
137 Inasmuch therefore, as your orator is remediless by the strict rules of the common law, and has no adequate remedy in law, and can have relief only in a court of equity, where such matters are properly cognizable, may it please your honor to grant unto your orator the most gracious writ of injunction issuing out of and under the seal of this court, commanding the said Denver and Rio

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Grande Railway Company, its agents, attorneys, servants, employees and officers to absolutely desist and refrain from entering upon the possession of your said orator, or on the line of your orator's
138 said road as located and platted in the said land office, or from entering upon, occupying or possessing, or from attempting to hold, occupy or possess any part or parcel of the said track of one hundred feet in width on each side of the centre line of said road as located by your orator. And that they desist and refrain from destroying said grade of said road or any part of it; and from removing or interfering with any stake or grade pegs or any marks upon rocks or elsewhere made by your orators for the purpose of locating its said line; and from interfering with or attempting to intimidate any of the servants or employees of
139 your orator's from working upon the same line of said road; and that they also desist and refrain from preventing or trying to prevent the servants and employees of your orators from passing along the line of said road as located by your orators; and from doing any act or thing calculated or intended to hinder or obstruct the said employees of your orator in the prosecution of its work in the construction of its said road on the said line so surveyed and located by your orators, and that they and each of them desist and refrain
140 from surveying, locating or attempting to survey or locate any line of railroad, or from constructing or attempting to construct any line of railroad over or upon said tract of one hundred feet on each side of the line claimed to have been located by your orator, and from taking any timber, material or stone from said tract, or any part there-

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of; and that they desist and refrain from continuing to hold, occupy or possess any part or parcel of said tract along the line of your orator's road

That subpœna may issue herein to the said Denver and Rio Grande Railroad Company according to law and the practice of this court and
141 the said defendant be required to appear at the next term of this court, and full, true and perfect answer make, but not upon oath, the oath being hereby expressly waived to all and singular, the allegations in this your orator's bill of complaint. And, further, to stand to and perform and abide such further direction as to your honor shall seem meet.

And your orator further prays that upon the final hearing in this cause the said injunction may be made perpetual. And for such further and other
142 relief as to your honor may seem meet and agreeable to equity. And your orator will ever pray, &c.

(Signed)

[L.S.] CAÑON CITY AND SAN JUAN RAILWAY COMPANY.
By Frederic A. Raynolds, President.

STATE OF COLORADO, } ss.
ARAPAHOE COUNTY, }

Frederic A. Raynolds being first duly sworn on oath says that he is the President of the Cañon City and San Juan Railway Company, plaintiff in the above entitled cause, that he has read the
143 foregoing bill of complaint and knows the contents thereof and that the matters and things therein stated are true in substance and in fact, except as to those matters therein stated upon information and belief, and as to those matters he believes it to be true. That the seal thereto

affixed is the corporate seal of the said Cañon City and San Juan Railway Company and that he has subscribed the said bill of complaint and affixed the corporate seal thereto for and on behalf of the said company.

(Signed) FREDERIC A. RAYNOLDS.

144 Subscribed and sworn to before me this 6th day of May, A. D. 1878.

(Signed) JOSEPH E. BATES,
[L.S.] Notary Public.

CHAS. E. GAST,
Solicitor for Complainant.

G. B. REED, and
W. TELLER,
of Counsel.

EXHIBIT "A."—COPY.

Know all men by these presents that the undersigned, Ebenezer T. Alling, John Locke and M. N. Megrew, of Cañon City, Fremont county, Colorado, have associated themselves together for the purpose of forming a corporate body
145 under and by virtue of the provisions of the general incorporation laws of the State of Colorado, the same being contained in Chapter Eighteen of the Revised Statutes of the Territory (now State) of Colorado, approved January 10th, 1868, and the acts amendatory thereto, and to carry on the business of a railroad company under the provisions granted by the laws aforesaid for the specific purposes hereinafter set forth.

I. The name of the company shall be "The Cañon City and San Juan Railway Company."

146 II. The objects and purposes of said company are to construct, improve and maintain a railroad

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to carry passengers and freight between Cañon City in the county of Fremont and the point known as the South Arkansas post office in the county of Lake in said State of Colorado, commencing at the company's depot site in Cañon City, to be hereinafter selected, thence up the valley of the Arkansas river through the Grand Cañon thereof; thence by the most practicable route following the Arkansas river to the point known as the South Arkansas post office in the

147 county of Lake aforesaid, with full power and authority to buy lands and tenements, and to receive the same by gift or demise for the successful, convenient and profitable running of the said railroad, and for depots, side tracks and workshops, and for any and all other purposes that may be desirable or profitable, with full power to convey, alien and encumber the same in whole or in part, and to sell the stock of the company.

III. The termini of said railroad shall be Cañon City in said county of Fremont and the point known as the South Arkansas postoffice, in

148 the said county of Lake, Colorado.

IV. The capital stock of said company shall be one hundred thousand dollars, to be divided into one thousand shares of one hundred dollars each.

V. The principal place of business of said company shall be Cañon City in the said county of Fremont.

VI. The number of trustees of said company who shall manage the business concerns of said company for the first year, shall be nine (9), and shall consist of the following named persons, to-wit: Ebenezer T. Alling, James Clelland, Henry

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149 Holbrook, Benjamin F. Rockafellow, John Lock, M. N. Megrew, and William F. Bailey, Fred A. Raynolds, Sam P. Dale.

VII. The officers of said company shall consist of a President, Secretary and Treasurer, and until a regular election is held as provided by law, Ebenezer T. Alling shall be President, Benjamin F. Rockafellow shall be Secretary, and James Clelland shall be Treasurer.

VIII. The term of existence of said company shall be twenty (20) years.

IX. The Trustees shall have the power to
150 make such by-laws and regulations from time to time as in their judgment shall be advisable for the successful management of the affairs of the said company.

X. An impression of the seal adopted by the said company as its corporate seal is hereto attached. [L. S.]

In witness whereof we, the undersigned, have hereunto set our hands and seals this 15th day of February, 1877.

EBENEZER T. ALLING, [SEAL]
JOHN LOCKE, [SEAL]
M. N. MEGRUE. [SEAL]

STATE OF COLORADO, }
151 FREMONT COUNTY, }

I, John Wilson, a County Clerk in and for said county and State, do hereby certify that Ebenezer T. Alling, John Locke and M. N. Megrue, who are known to me to be the persons whose names are subscribed to the foregoing certificate of incorporation, personally appeared before me and acknowledged that they signed and sealed the said

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instrument of writing as their free act and deed, for the uses and purposes therein expressed.

Given under my hand and official seal this 15th day of February, 1877.

152 [L. S.] JOHN WILSON,
County Clerk.

Endorsed:

No. 155—Circuit Court United States. The Cañon City and San Juan Railway Company vs. The Denver and Rio Grande Railway Company. Amended bill. Filed May 9th, A. D. 1878.

(Signed) EDWARD F. BISHOP, Clerk.
C. E. GAST,
G. B. REED,
WILLARD TELLER,
Attorneys for Plaintiff.

And thereupon, and on the same day, to-wit: the 9th day of May, A. D. 1877, the following chancery subpœna and writ of injunction was sued out of said court and in said cause by the
153 said complainant, to-wit:

UNITED STATES OF AMERICA, }
DISTRICT OF COLORADO, } ss.

The President of the United States of America to the Denver and Rio Grande Railway Company—Greeting:

We command you, That you appear before our Judges of our Circuit Court of the United States of America, for the District of Colorado, at the city of Denver, in said District, on the first Monday in June next, (it being the 3d day of June, A. D. 1878), to answer the amended bill of com-
154 plaint of the Cañon City and San Juan Railway Company this day filed in the office of the Clerk

SUBPŒNA.

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of said court, in said city of Denver, then and there to receive and abide by such judgment and decree as shall then or thereafter be had upon said bill of complaint, upon pain of judgment being pronounced against you by default, and a decree had and entered accordingly.

To the Marshal of the District of Colorado to execute, and make due return.

Seal Circuit Court, U. S. Col.

Witness, the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, and the seal of our Circuit Court
155 of the United States, for the District of Colorado, at the city of Denver, aforesaid, this 9th day of May, in the year of our Lord, one thousand eight hundred and seventy-eight, and of the Independence of the United States, the 102d year.

(Signed) EDWARD F. BISHOP, Clerk.

MEMORANDUM.

The above named defendant is hereby notified that unless it shall enter its appearance in the office of the clerk of said court, at the city of Denver, aforesaid, on or before the day to which the above writ is returnable, the complainant's bill will be taken against it as confessed, and a decree entered accordingly.

EDWARD F. BISHOP, Clerk.

DISTRICT OF COLORADO, } ss.

DENVER, May 13th, A. D. 1878.

I have duly executed the within writ by deliv-
156 ering a true copy of the same to William Wagner, Secretary of the within named Denver and Rio Grande Railway Company at the town of Colorado Springs, on Saturday, the 11th day of May, 1878.

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This writ therefore returned duly executed as the law directs, this 21st day of May, 1878.

P. P. WILCOX, Marshal.

By FRANK HALL, Deputy Marshal.

257 Gen. No. 155. Circuit Court of the United States, for the District of Colorado. The Cañon City and San Juan Railway Company vs. The Denver and Rio Grande Railway Company. Chancery subpœna, on amended bill. Returnable to rule day, first Monday in June, A. D. 1878. (Signed) Edward F. Bishop, Clerk. Filed this 22d day of May, A. D. 1878. (Signed) Edward F. Bishop, Clerk. Gast, Teller, Reed, Complainant's Solicitors.

UNITED STATES OF AMERICA, } ss.
DISTRICT OF COLORADO, }

The President of the United States of America to the Denver and Rio Grande Railway Company, and to your officers, attorneys, solicitors, agents, employees, engineers and servants, and to each and every of them, greeting.

Whereas it hath been represented to the Honorable, the Judges of the Circuit Court of the United States, for the District of Colorado, on the
158 part of the Cañon City and San Juan Railway Company, complainant, in its certain bill of complaint exhibited before said Judges, and filed in said court against you, the said the Denver and Rio Grande Railway Company to be relieved, touching the matters and things therein complained of.

In which said bill it is stated, among other things, that your are combining and confederating with others to injure the complainant, touching the

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matters set forth in said bill, and that your actions and doings in the premises are contrary to equity and good conscience, and the Honorable Moses Hallett, District Judge, having made and granted an order that you be restrained and en-

159 joined according to the prayer of said bill

In consideration thereof, and of the particular matters in said bill set forth, you are hereby strictly commanded that you, the said the Denver and Rio Grande Railway Company, and the persons before mentioned, and each and every of you, do absolutely desist and refrain from occupying, or attempting to occupy, the Grand Cañon of the Arkansas river, and from in any way or manner constructing, or attempting to construct, survey or locate their line of railroad through said cañon, and from in any way or manner aid-

160 ing or abetting others to do any of those things, and for the purpose of this suit the said cañon shall be taken and deemed to begin at what is known as the "Point of Rocks" at the mouth of said Grand Cañon, and about two miles above the village of Cañon City, and to extend and continue thence up the Arkansas river, following the course of river to a point one-half mile above the wagon bridge over said river, known as the McCandless, or twelve-mile bridge, until this Honorable Court, in Chancery sitting, shall make other order to the contrary. Hereof fail not under penalty of what the law directs.

To the Marshal of said District, to execute and return in due form of law.

Witness the Hon. R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of the said Circuit

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[L.S] Court, at the city of Denver, in the district aforesaid, this 9th day of May, A.D. 1878.

And of the independence of the United States, the 102d year.

161 (Signed) EDWARD F. BISHOP, Clerk.

MARSHAL'S RETURN.

DISTRICT OF COLORADO. } ss.

Writ received May 9th, 1878.

I have duly executed the within writ of injunction by delivering a true copy of the same personally to William Wagner, secretary of the within named Denver and Rio Grande Railway Company at the town of Colorado Springs, on Saturday the 11th day of May, 1878.

This writ, therefore, returned duly executed as the law directs this 21st day of May, A.D. 1878.

162 P. P. WILCOX, Marshal.
By FRANK HALL, Deputy Marshal.

Gen. No. 155. Circuit Court of the United States, District of Colorado. The Cañon City and San Juan Railway Company, complainant, versus The Denver and and Rio Grande Railway Company, defendant. Injunction. Filed this 22d day of May, A D. 1878.

(Signed) EDWARD F. BISHOP, Clerk.
GAST, TELLER AND REED,
Petitioner's Attorneys

And afterwards and on to-wit, the first day of
163 June, A. D. 1878, in Vacation at Chambers, before the Honorable Moses Hallett, District Judge, the

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following order was had, signed by said Judge, filed and entered of record in said court and in said cause, to-wit:

THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY
—versus—
THE DENVER AND RIO GRANDE RAILWAY COMPANY.

164 Now on this first day of June, A. D. 1878, in vacation, this cause coming on to be further heard on the pleadings therein and on evidence heard at chambers before the Honorable Moses Hallett, District Judge, it is

Ordered, That the injunction heretofore and on the eighth day of May, A. D. 1878, allowed in this cause be restricted in its operation to what is known as the Royal gorge of the Grand Cañon of the Arkansas river, which is more particularly described as follows, to-wit: Commencing at or
165 about the centre of the northwest quarter of section twenty-six, at a point seven hundred or eight hundred feet above a ravine coming in from the north on the said river and extending up the said river to the centre of the south half of the northwest quarter of section twenty-two, township eighteen, south of range seventy-one west in the county of Fremont and State of Colorado, supposed to be about sixty-six hundred feet in length: and that as to the portion of the said cañon above described, the said order heretofore
166 entered in this cause stand in full force and effect until the court shall otherwise order and direct.

And on the same day certain opinions of the District Judge of said court and of the Circuit Judge of said circuit were filed in said court and

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in the cause wherein the Denver and Rio Grande Railway Company is complainant and Ebenezer T Alling et al. are defendants, in words and figures as follows, to-wit:

167 In the Circuit Court of the United States for the District of Colorado.

THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY —versus— THE DENVER AND RIO GRANDE RAILWAY COMPANY. } *Bill for Injunction.*

THE DENVER AND RIO GRANDE RAILWAY COMPANY —versus— EBENEZER T. ALLING, *et al.* } *Bill for Injunction.*

168 Opinion of Hallett, District Judge, and concurring opinion of Dillon, Circuit Judge, on prayer for injunction.

Hallett, J. Two companies claim the same right of way for a railroad through the Grand Cañon of the Arkansas river, where there is room for only one road. That remarkable defile is in the public domain, and each company claims under an act of Congress. The interpretation and application of these acts presents a question under the laws of the United States, which may properly be considered in this court, pursuant to

169 the provisions of the act of 1875 (18, Stat., 470.)

The jurisdiction in equity to determine the right and restrain any disturbance of it is not doubted, since there is no adequate remedy at law. The first of these suits was brought in the District Court of Fremont county, and an injunction was there allowed restraining the defendant company from prosecuting work in the cañon.

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After some days that suit was removed into this court on petition of the defendant therein, under the authority of the act of 1875, and the defend-
170 ant in that suit brought a new suit in this court, against the corporators of the first named company, and some others, to enjoin them from disturbing its right to occupy the cañon. The reason for bringing this last suit against the corporators of the San Juan company, and not against the company itself, is an irregularity in the organization of the latter company, on which the plaintiff relies to impeach its validity.

Argument was heard in the last mentioned suit on a motion for injunction, and perceiving that the same matters were involved in both suits, and
171 that the right was somewhat doubtful, it was thought best to continue the injunction in tne first suit and allow a like writ in the second, in effect to place both parties under restraint until mature consideration of the questions presented could be had. The bill in the first suit was something lame and impotent, and the plaintiff therein was allowed to file an amended bill upon which a writ was issued of the same scope and effect as that allowed in the second suit. As the controversy
172 stands, both parties are enjoined from prosecuting the work of a great public improvement where one must be entitled to go on, and, therefore, the court should not halt between opinions.

Both cases will be taken into view in this discussion, and the allegations in each bill, so far as they are not in conflict, will be taken as true. It is believed that enough is admitted in the records of the two cases to determine the right to a preliminary injunction. The Denver and Rio Grande

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Railway Company, defendant in the first suit, and plaintiff in the second, has the senior claim, and in ascertaining its right, we shall reach the princi-

173 pal question in the case. That corporation was organized in the year 1870, under Chapter XVIII. of the Revised Statutes of the Territory. (R. S., 47.) The object of the corporation, as expressed in the certificate, was to construct a number of railway and telegraph lines, or perhaps it would be more correct to say a trunk line with numerous branches. The principal line was to be extended from Denver, through Colorado and New Mexico, to El Paso, in the State of Chihuahua, and there were to be seven branches, one of them extending to Salt Lake City, in Utah, and the

174 others to various points in Colorado and New Mexico. These lines were defined generally in the certificate as extending from place to place, or lying in the valley of some stream, or through some cañon or pass in the mountains, but no attempt was made to give courses and distances, or to specify in any other way the exact location of the routes selected. Indeed, it seems that the various lines had not been fixed, except as to the general direction, and no survey had been made by which they could be definitely located. Referring to the principal line, which was more

175 particularly defined than any of the branches, the part which includes the disputed territory is as follows:

"Commencing at Denver, Colorado Territory, thence running up the valley of the South Platte River, on the southeast side thereof, to a point at or near the mouth of Plum Creek; thence up the valley of Plum Creek to a point at or near the

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forks of East Plum Creek and West Plum Creek; thence up the main east branch of Plum Creek valley, to the lake in township eleven (11), range sixty-seven (67) west, on the crest of the ridge
176 dividing the waters of Plum Creek and Monument Creek; thence down the valley of the Monument Creek to a point at or near the junction of the valleys of the Monument and Fountain qui Bouille, or to a point in the Fountain Valley, below the mouth of the Monument, if the detailed survey shall determine the latter to be the most eligible; thence by the valley of the Fountain or across its west tributaries, to such a point on the Arkansas River, at or above Pueblo, as may be found upon a detailed survey to be the most eligible for intersecting the same; thence up the
177 valley of the Arkansas River to a point at or near Cañon City; thence continuing up the valley of the Arkansas, through the Big Cañon of the same, to a point at or near the mouth of the South Arkansas River; thence by the valleys or the adjoining slopes of the South Arkansas River, and of the Poncho Creek to the summit of the divide, between the waters of the Arkansas and the San Luis Park (known as Poncho Pass); thence by the most eligible route in a general southerly direction down the San Luis Valley to the valley of the Rio Grande del Norte."

Every one who is at all acquainted with the
178 geography of the country, will know that the line between the mouth of Monument creek and Cañon City as thus described embraces a strip of country more than forty miles wide, in which the road might have been located. If it was more restricted in the mountain region beyond Cañon

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City, it was because the valley of the Arkansas was narrower there, and not from any effort of the corporation to describe the line with accuracy. Farther on, in the San Luis valley, which is many miles wide, it takes the whole valley for its location, and so also down the Rio Grande river through New Mexico.

179 It is to be observed, however, that the act under which the corporation was organized did not require any description of the lines of road to be constructed, or even that the termini of the roads should be stated. But it did require a statement of the object of the company, and in the case of a railroad, perhaps that would be most conveniently done by giving some general description of the road. That was a general act providing for many different corporations, which was probably intended to comply with the direction of Congress in 1867, that Territorial Assemblies should not grant private charters, but could, by
180 general acts, permit the incorporation of persons for mining, manufacturing and other industrial pursuits. (14 Stat. 426). It contained general provisions applicable to all corporations which should be organized under it, and special provisions which were applicable to some only. Railroad companies were not of this latter class, but were left to the general provisions of the act, which required no designation of the route or termini of the road, further than would be necessary in stating the objects of the company.

Without other authority than was given by this general act of the Territory, the company built its
181 road to Pueblo. On the 8th day of June, 1872, Congress passed an act granting to the company

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right of way over the public lands, and confirming the powers given to the company by the Territorial law. The act required the company to build its main line as far south as Santa Fé within five years, which period is by a later act extended to ten years. (19 Stat. 405).

The material part of the act for present consideration is as follows: "That the right of way over the public domain, one hundred feet in width on each side of the track, together with such public lands adjacent thereto as may
182 be needed for depots, shops and other buildings for railroad purposes, and for yard room and side tracks, not exceeding twenty acres at any one station, and not more than one station in every ten miles, and the right to take from the public lands adjacent thereto, stone, timber, earth, water and other material required for the construction and repair of its railway and telegraph line, be, and the same are hereby granted and confirmed unto the Denver and Rio Grande Railway Company, a corporation created under the incorporation laws of the Territory of Colorado, its successors and assigns." (17 Stat., 339) On behalf of the Rio
183 Grande Company, it is contended that this act conferred an exclusive right to occupy the Grand Cañon of the Arkansas river for railroad purposes; that the certificate of organization is a public record, of which Congress had notice at the time of passing the act, and as the cañon is mentioned in the certificate as a point on the line of the road, the company was authorized and required to build in that place. And certainly it will be conceded that Congress was advised of everything that the law required to be stated, and

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that was in fact stated in the certificate of incorporation. That certificate was evidence of the cor-

184 porate existence of the company under the Territorial law, and Congress in recognizing the company and confirming to it the powers given by the law of the Territory, must have acted with reference to it.

And so, if the act had required the corporators to describe the various lines of road which the company proposed to build, and they had so described them with particularity in the certificate, the effect of the act of Congress would not be doubtful. In that case the act of Congress would operate as a present grant of the particular way or ways described in the certificate.

185 But the certificate does not in fact locate the different lines of road with such particularity as is required in granting a right of way. Said the Supreme Court of Massachusetts: "A way *ex ri termini*, imports a right of passing in a particular line."

Jones vs Percival, 5 Pick., 485.

And if the line is not described with reasonable certainty, it cannot be said that the grant is of a particular way by description. No one will contend that a grant of right of way to a railroad company, either by the government or an individual, must specify the exact line of the road,

186 but at least the tract to be traversed by the road must be designated. The description must come within something less than 40 miles of the line of location. In this certificate there is nothing like a description of any particular line. The mention of points and places on the various lines was but an indication of the general course and

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direction of those lines, and the statement that the line should be in a certain valley was not more definite. Like the mouth of Monument creek, the Arkansas river, Cañon City and other points on the line, the object of naming the Big Cañon of the Arkansas river was apparently to
187 give the general course of the road. Certainly it cannot be said that naming these points and places is a sufficient description to charge the public lands along the line with an easement of which purchasers would have notice.

If it is claimed that we should separate the Big Cañon from the remainder of the line, and accept that portion as sufficiently described because its mighty walls enclose a narrow space, the proposition cannot be entertained. The grant is an entirety as to all public lands lying in the course of the several lines of road, and it would be absurd to say that it was intended to pass this cañon
188 by description and nothing more. Congress had already learned the strategical value of passes and defiles in the mountains, and when it was intended to grant such places by description the right of other companies to occupy the same ground was was reserved. (17 Stat. 202).

We may say, then, that this was no grant of a particular way over the public domain, and we have yet to consider its effect as a general authority to appropriate the public lands to the uses of the company. That it is in terms such a grant no one can deny, and we should hesitate to
189 say that it may be void for uncertainty. We may concede the power of Congress to charge all the government lands in perpetuity, with a floating easement which may be asserted at any time against

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184 porate existence of the company under the Territorial law, and Congress in recognizing the company and confirming to it the powers given by the law of the Territory, must have acted with reference to it.

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189 say that it may be void for uncertainty. We may concede the power of Congress to charge all the government lands in perpetuity, with a floating easement which may be asserted at any time against

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innocent purchasers who have bought of the public lands in good faith, but we should be slow to believe that such was the intention, unless it is plainly declared. If by the act of 1872 the company acquired a present right to appropriate for right of way and stations any lands that were then public, lying in the general course of any of its lines, farms, villages and towns that have been
190 taken up since that time, must yield to such right. It is not to be presumed, however, in the absence of express declaration, that such a result was intended by Congress. "If A seized of a great waste, grants the moiety of a yard land lying in the waste, without ascertaining what part, or the special name of the land, or how bounded, this may be reduced to a certainty by the election of the grantee. But it is otherwise in the case of the king's grant, for there can be no election in that case, and therefore the grant is void for uncertainty."

Bacon's Ab. Title Grant, H. 3.

And so we may say in accordance with the
191 principle that a grant to a corporation shall be strictly construed in favor of the public and against the corporation, that the act of 1872 gave nothing except upon the location and construction of the road. In the general act of 1875 (18 Stat. 482,) and in most special acts granting right of way over public lands (16 Stat. 393; 17 Stat. 202, 212, 224, 340, 343, 393, 612; 18 Stat. 130, 274, 306, 509,) provision is made for filing a plat of the route selected with the Secretary of the Interior, and the line of the road is then minuted on the plat of the public surveys in the local office. In this way full notice is given to purchasers, and

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192 all who may be interested in the subject, of the right claimed by the company. Any sale of the lands must be made subject to the easement, and hence the necessity for specifying the lands so to be affected. Under these acts it seems very clear that no right is secured by the company until the plat is filed with the secretary. In the act of 1872 and in some other acts (14 Stat., 211, 237, 240, 290, 294; 16 Stat., 192; 17 Stat., 280), no such provision is found, and the omission suggests that some other method of designating the lands appropriated by the company was intended. That method, in the absence of any

193 other prescribed by law, can only be the use and occupation of the lands for the purpose indicated in the act. As under acts of the first class the company will not acquire any interest in the public lands until the plat shall be filed, so under acts of the second class no interest is acquired until the lands are occupied by the company.

Under all acts regulating the sale of public lands the grantee is required to designate the part which he will take in order that it may be segregated from the general mass. It is so under homestead and pre-emption laws and all other

194 laws for disposing of public lands, unless the acts of this class shall be regarded as an exception. Certainly there can be no hardship in requiring these companies, in accepting the bounty of the government, to conform to the general rule.

Referring to a similar act, the Supreme Court of California says:

"It was doubtless the purpose of the act merely to give a right to enter on the public lands, assuming them to be vacant, and its effect is to re-

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linquish to the plaintiff (the railroad company) any claim for compensation that might belong to the United States as proprietor, under any proceeding under the state law to appropriate the
195 land for public use."

Northern R. R. Co. vs. Gould, 21, Cala. 260.

So here it may be said that the act of 1872 authorized the company to go upon such of the public lands as should be found vacant and unoccupied and appropriate them to the uses of their roads. In this sense it was a grant *in presenti* but not otherwise, and any rights in the public lands secured by others under existing laws before any occupation or appropriation by the company must be respected by the latter.

(In Central Pacific R. R. Co. vs. Dyer, 1, Saw-
196 yer, 641, this conclusion was apparently rejected upon grounds which are not stated, but I have not been able to adopt the views of the distinguished judge who delivered the opinion in that case.)

Having ascertained that no interest in the lands in controversy passed to the company under the act of 1872 until it should appropriate them to its own use, we have next to inquire whether there was in fact any such appropriation of the Grand cañon before the rival company set up a claim to it. On this point the company avers:

1st. That in the years 1871–2 it surveyed and
197 located its line through the cañon and set substantial stakes upon it.

2d. That it did, in the same years, "in sundry places in and near said cañon, grade and excavate the bed and line of its said railway."

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3rd. That about the year 1875 it completed its road from Pueblo to Cañon City.

If any of the these acts afford evidence of occupation and appropriation by the company such as the public were bound to respect, its right was thereby established. That the surveying and staking does not afford evidence of that character
198 is clear enough on reason and authority.

Merritt vs. Northern R. R. Co., 12 Barbour, 606.

Morris & Essex R. R. Co. vs. Blair, 1 Stockton, 635.

As I had occasion to say, some years ago in another case, which arose under a similar act of Congress, the modern practice of surveying several routes in order to induce the people to give lands, bonds and other aid, or give the right of way, on favorable terms, in consideration of the building of the road on one or the other of the lines so surveyed, must tend strongly to discredit any such evidence of location. Indeed, railroad
199 companies in this country, at all events, are constantly surveying new routes in an experimental way, and no one is disposed to accept anything less than the building of the road itself as evidence of a permanent location. As to the work alleged to have been done "in and near" the cañon, it will be observed that the language of the bill is exceedingly vague. If a road bed was constructed for any considerable distance which would in itself afford evidence of the character of the improvement that would be an act of appropriation which no one could deny. But to overturn a few shovelfuls of earth here and there

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would not leave any intelligible sign of the com-
200 pany's occupation. The charge in the bill is entirely consistent with very little work, and for the present purpose of determining the right to a preliminary injunction, it must be regarded as insufficient. If at the hearing it can be shown that substantial work was done there another view may be taken of it. As to building the road from Pueblo to Cañon City, if before any adverse occupation of the cañon, the company had shown a purpose to go on from the latter place, some weight might be given to it. With a line located and in process of construction from place to place,
201 no other company would be allowed to interfere under an act even more vague and indefinite than that of 1872. But the company halted for three years at a town at the base of the mountains, which might be regarded as a permanent terminus. Meanwhile, if reference may be had to a fact which is not in the pleadings, but may be taken as belonging to the history of the country, that company reached the San Luis Valley by another line, and that is in the course of the line through the Grand Cañon towards El Paso. These circumstances do not show a purpose to prosecute the work beyond Cañon City, but they tend in the
202 opposite direction; and this must also be rejected as failing to show occupation and appropriation by the company.

At the time this controversy arose the land in and along the Grand Cañon was of the public domain, and still subject to occupation and appropriation under the act of 1872, if it had not been previously appropriated by the rival company. That company is known in the pleadings as The

OPINION HON. MOSES HALLETT, DISTRICT JUDGE.

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Cañon City and San Juan Railway Company, and its corporate character is denied upon the ground that its certificate of incorpation is defective.

203 The act of 1876 (II. Sess., 41) provides among other things to be set out in a certificate of incorporation, "the name of the town or the place and the county in which the principal office of the company shall be kept, and the name of the county in which the principal business of the company shall be carried on."

A substantial compliance with this act was all that was required.

Spring Valley Water Works vs. San-Francisco, 22 Cala., 434.

As to the first clause, requiring the office of the

204 company to be designated, the corporators of the San Juan Company declared in their certificate: "The principal place of business of said company shall be Cañon City, in the said county of Fremont." In the case of a railroad company, the "principal place of business" is obviously the "principal office." With manufacturing corporations this may not be true, but a railroad company having business all along its line has no principal place of business other than its general or principal office. As to the second clause of the act above recited, which requires the county in

205 which the principal business will be carried on to be stated, it was sufficiently observed by stating the counties in which the road was located. As before observed, the company will do business wherever the road may run, and its "principal business," if that can be separated from the general office, must be along the whole line of road.

FOLIO

If this clause of the act has any application whatever to railroad companies, it ought to be sufficient to state the counties through which the road will pass. It would seem idle to state separately, after giving the location of the road in the certificate, that the principal business of the company would be carried on in the counties of Fremont and Lake, where the road would be built. The certificate is regarded as complying substantially with the act, and therefore sufficient.

206

The act of 1868 on the same subject (R. S., 118,) under which the Rio Grande Company was organized, was quite different. It required "the name of the town and county in which the operations of the said company shall be carried on," to be given, and the corporators of that company designated the principal office, but did not attempt to locate the "operations" of the company in any town or county. If any defect arose out of that omission, it was probably cured by the act of Congress of 1872.

207

In the bill filed by the Rio Grande Company it is alleged that the defendant never did, in fact, survey any line through the cañon, and this, if true, may be of weight. The latter company, however, in its bill, avers that the survey was duly made, and the allegation is supported by a copy of the profile of the line which appears to be approved by the Secretary of the Interior. For the present we must regard the survey and location of that line as having been made according to the act of 1875 (18 Stat., 482), and sufficient to vest in the company the right to occupy and use the cañon for railroad purposes as against one claiming under the act of 1872.

208

FOLIO

That the Rio Grande company may be admitted to the same right of way if there is room for two roads in the cañon, seems to be clear, and perhaps that company may be entitled to use the track of the San Juan company if there is room for but one road. This last question may be passed for the present, and as to the first, it is

209 only necessary to say that both companies cannot go on with the work of construction at the same time, in a narrow defile such as the cañon is said to be. To permit it would be to perpetuate the conflicts which we were lately asked to suppress. If the San Juan company must admit its rival to its right of way or to its track, that can only be done after its road has been built. In building its road through the cañon, however, due regard must be had to the rights of the other company, and the line must be so located as to admit of the construction of another road if that be possible.

210 Under the act of 1875 one company cannot appropriate all the available ground in a cañon, pass or defile to the exclusion of another if less than the whole will reasonably answer its purpose. To enforce this provision perhaps the court upon proper demand therefor should control the location and building of the first road to such extent as may be necessary to protect the rights of other companies who may wish to use the same cañon. This question can be better considered at the term which is near at hand, and the parties may then be heard as to the proper course to be pursued. Until then the San Juan

211 company will be allowed to proceed with the work of grading the line only, which will admit of change and correction without serious loss to the

FOLIO

company. That is to say, the company may proceed in its own way to grade the road, but we reserve the right to correct the location and grading upon complaint made to us by the Rio Grande company, if we find that we have power to proceed in that manner.

Endorsed:

212 No. 154.—Circuit Court, United States.—The Denver and Rio Grande Railway Company versus the Atchison, Topeka and Santa Fe Railway *et al.* Opinion by Judge Hallett. Filed June 1st, A. D. 1878.

(Signed) EDWARD F. BISHOP, Clerk.

By HENRY SPARNICK, Deputy.

OPINION—DILLON, CIRCUIT JUDGE.

UNITED STATES CIRCUIT COURT,
DISTRICT OF COLORADO.

THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY
—versus—
THE DENVER AND RIO GRANDE RAILWAY COMPANY.

THE DENVER AND RIO GRANDE RAILWAY COMPANY
—versus—
EBENEZER T. ALLING ET AL.

DILLON, CIRCUIT JUDGE.

The Denver and Rio Grande Railway Company has the right to construct its railroad through the Big Cañon of the Arkansas under the act of Con-

213 gress, June 8th, 1872

FOLIO

The Cañon City and San Juan Railway Company has the like right under the act of Congress of March 3d, 1875.

The first named company's rights as against the last named company, or any company duly organized, was not complete and exclusive as to any part of the cañon until actual location and adoption of its line by corporate acts or action, followed by actual use and appropriation. That this was done by the first named company prior to March 3d, 1875, does not appear with such certainty in the bill or pleadings, as to afford a basis
214 for a judicial order in its behalf.

Assuming, therefore, at this stage of the cause, that there was no consummated exclusive right in the Denver Company at the time when the Cañon City Company was organized (Feb 15th, 1877,) we have the case of a concurrent right in the two rival companies to construct their roads through the cañon, and to use and occupy the cañon for that purpose.

The second section of the act of March 3d, 1875, contains a special provision which, in the
215 supposed state of facts, applies to these companies. It provides that "any railroad, whose right of way or whose track or road bed upon such right of way, passes through any cañon, pass or defile, shall not prevent any other railroad company from the use and occupation of the said cañon pass or defile, for the purposes of its road in common with the road first located, or the crossing of other railroads at grade"

I concur in Judge Hallett's opinion that the pleadings as they stand do not show a state of facts which give the Denver Company an exclu-

FOLIO

sive right to the use of the cañon. What the
216 proofs may hereafter show cannot, of course, be anticipated.

The cañon is alleged to be only forty-five feet in width at the narrowest portion.

It is alleged by the Denver Company that not more than one railway with way of the width in the act of Congress granted (100 feet in width on each side of the track), can be constructed through said cañon. But it does not appear that it is physically impossible to construct two lines of railway through the cañon.

217 The intent of Congress is plain that cañons and defiles in the public domain shall not be monopolized by one company. If there is room for two lines in this cañon, each company, so far as now appears, has the right to use and occupy the cañon for the construction of its road. Usually thirty feet in width and even less is ample space for two parallel lines of railway track. If each company desires to construct its line through the cañons, each should be permitted to do so, if it is practicable.

If a centre line be drawn through the cañon,
218 one company should be restricted to the space on one side of that line, and the other to the space on the other side of that line, if this will allow of the construction of the two lines of railway in the cañon, and no other course is more equitable. If it is uncertain whether the course above suggested is practicable, *i. e.*, whether there is space for the two lines of railway in the cañon, a commission of one or more disinterested engineers
219 can be hereafter sent by the court to report the facts to the court for its information.

FOLIO

If only one road can be constructed there, on the pleadings and the present status of the case, I think the Denver Company is not entitled to an injunction against the Cañon City Company.

If both companies are ready to go forward to construct their roads immediately, one company should not be permitted to adopt a route which will prevent the other company from an equal, fair and reasonable use of the cañon. "Equality is equity." Such are my general views as to the law of the case as it is now presented.

220 The precise order that ought to be made at this time is somewhat uncertain, by reason of an allegation by way of amendment to the bill of the San Juan Company, which the demurrer admits. That amendment is as follows: "Plaintiff further avers that by reason of the narrow and crooked course of said cañon through the close or narrow part thereof, not more than one railway can be constructed through the said narrow part, except by laying the track of one of said railways across the track of the other in many places, nor without
221 great and constant hazard of collisions between the trains, operated on said two railways."

It may be taken sufficiently to appear as the case stands, that both companies cannot go on with the work of construction at the same time. It does not to my mind satisfactorily appear that there may not be room for two lines in all parts of the cañon.

The San Juan Company as above held on the pleadings, as they now stand, has the prior right of occupation, and it may, if it chooses, go on with
222 the work of grading and construction between this and the term (which occurs in a little more than

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a month,) meanwhile to lay no iron until further orders, and meanwhile the Denver Company to be enjoined.

The Denver Company can then show that the San Juan Company are proceeding improperly, with a view unfairly to monopolize the entire route, and to exclude it, if such is the fact. We can then adopt such course and make such orders as may appear to be right and just to each of the
223 companies. Knowing our general views of their respective rights under the two acts of Congress, it may not be too much to hope that they may adjust the controversy by agreement.

I recommend a temporary order in conformity with these views if Judge Hallett concurs.

Endorsed:

No. 154.—Circuit Court, United States. The Denver and Rio Grande Railway Company versus The Atchison, Topeka and Santa Fé Railway Company et al. Opinion by Judge Dillon. Filed June 1st, A.D. 1878.

(Signed) EDWARD F. BISHOP, Clerk.
By HENRY SPARNICK, Deputy.

224 And afterward, and on, to-wit, the 1st day of July, A.D. 1878, came again the said defendants, by Hanson A. Risley, Esq., its solicitor, and filed in said Court and in said cause its demurrer to the amended bill of complaint, and the said demurrer is in words and figures, as follows, to-wit:

DEMURRER TO AMENDED BILL.

THE UNITED STATES OF AMERICA, }
DISTRICT OF COLORADO. }

DEMURRER TO AMENDED BILL.

FOLIO

In the Circuit Court of the United States within and for said District. Of the July Term, A.D. 1878. In Equity.

THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY
—versus—
THE DENVER AND RIO GRANDE RAILWAY COMPANY.

225 The demurrer of the Denver and Rio Grande Railway Company, defendant, to the amended bill of complaint of the Cañon City and San Juan Railway Company, complainant, filed in the said Circuit Court, on the ninth day of May, A.D. 1878.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in said amended bill of complaint to be true in such manner and form as the same are therein set forth and alleged, doth demur thereto.

And for cause of demurrer shows to the court here:

(1) That the said plaintiff hath not in and by
226 its said bill made or stated such a case as doth or ought to entitle it to relief in equity from or against this defendant touching the matters contained in said bill or any of such matters.

(2) The said complainant doth not in and by its said bill allege or show that any copy of its articles of incorporation or any proofs whatsoever of its organization under the same, have at any time heretofore been filed with the Secretary of the Interior, as required by the act of Congress approved March 3d, A. D. 1875, in the said bill mentioned.

DEMURRER TO AMENDED BILL.

FOLIO

Wherefore, and for divers other good causes of demurrer appearing in the said amended bill of
227 complaint, this defendant doth demur thereto and to all the matters and things therein contained, and humbly prays the judgment of this honorable court whether it shall be compelled to make any further or other answer to the said amended bill, and prays to be hence dismissed with its reasonable costs in this behalf most wrongfully sustained

I certify that in my opinion the foregoing demurrer of the Denver and Rio Grande Railway Company, defendant, to the amended bill of complaint of the Cañon City and San Juan Railway Company, complainant, is well founded in law and proper to be filed in this case.

(Signed) HANSON A. RISLEY,
Solicitor for Defendant.

228 E. T. WELLS, E. L. SMITH, THOS. MACON,
Of Counsel.

UNITED STATES OF AMERICA, } ss.
DISTRICT OF COLORADO. }

Hanson A. Risley of Colorado Springs, El Paso county, Colorado, being duly sworn, saith on oath that he is the general solicitor and legal officer, and as such is familiar with the controversy above mentioned, and charged with attending to the interesis of the Denver and Rio Grande Railway Company, the defendant named in the above entitled cause; that he hath had principal charge for said defendant of the defense to the said above entitled cause; and for and on behalf
229 of said defendant, deponent saith that he hath read the above demurrer to the amended bill of complaint in this said suit, and the same is not inter-

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posed for the purpose of delaying said suit or any proceedings therein.

(Signed) HANSON A. RISLEY.

Subscribed and sworn to before me this 1st day of July, A. D. 1878.

[L. S.] (Signed) EDWARD F. BISHOP,
Clerk C. Court, U. S.

Endorsed:

No. 155.—United States Circuit Court, District of Colorado. Cañon City and San Juan Railway Company versus the Denver and Rio Grande Railway Company. Demurrer to the amended bill of complaint. Filed July 1st, A. D. 1878.

(Signed) EDWARD F. BISHOP, Clerk.

W. S. and M. and H. A. R.

230 And afterwards and on to-wit, the 6th day of July, A. D. 1878, the same being one of the regular juridicial days of the July term, A. D. 1878, of said court, present the Honorable John F. Dillon, Circuit Judge, and the Honorable Moses Hallett, District Judge, the following further proceedings were had and entered of record in said court and said cause, to-wit:

ORDER.—DEMURRER TO BILL CONFESSED; LEAVE TO AMEND BILL.

THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY
—versus—
THE DENVER AND RIO GRANDE RAILWAY COMPANY.

For Injunction and other Relief.

At this day comes the said complainant by W. Teller, Esq., its solicitor, and the said defendant,

231 by Thomas Macon, Esq., its solicitor, also comes.

And, thereupon, the said complainant here in open court, saith that as to the demurrer of the

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said defendant to the bill of complaint herein it doth and will confess that the said bill of complaint, and the matters and things therein set forth, are not sufficient in law for the said defendant to answer unto.

Nevertheless, on its motion, leave is given the said complainant to amend its said bill of complaint as it shall be advised.

And afterwards and on, to wit, the 10th day of July, A D. 1878, came again the said complainant by C. E. Gast, Esq., its solicitor, and filed in said
232 court and in said cause its certain further amendment to its bill of complaint, and the said amendment is in words and figures as follows, to wit:

SECOND AMENDMENT TO BILL.

IN THE CIRCUIT COURT OF THE UNITED STATES,
EIGHTH CIRCUIT, DISTRICT AND STATE OF COLORADO.

THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY
—versus—
THE DENVER AND RIO GRANDE RAILWAY COMPANY.

Now comes the said complainant and by leave of the court amends its bill of complaint herein as follows, to wit, by inserting, between the word "required" and the word "and," and immediately
233 succeeding the word "required," in the 24th line of page four of said bill, the following words, viz: "And also within the said twelve months after such survey and before the commencement of this

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action, filed with the said Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the laws of the State of Colorado, and of the said articles of incorporation aforesaid.

(Signed) FREDERICK A. RAYNOLDS,
[L.S.] President.
G. B. REED, W. TELLER, of Counsel.

STATE OF COLORADO, }
FREMONT COUNTY. }

Frederick A. Raynolds, being first just duly
234 sworn, says he is President of the Cañon City and San Juan Railway Company, plaintiff in the above entitled cause, and has heard the foregoing amendment to the bill of complaint read and knows the contents thereof and that the matters and things therein stated are true in substance and in fact, except as to those matters stated on information and belief, and as to those matters he believes it to be true, and that the seal thereto affixed is the corporate seal of the said plaintiff, and that he has subscribed said amendment and affixed the seal thereto on behalf of said company.

(Signed) FREDERICK A. RAYNOLDS.

Subscribed in my presence and sworn to before
235 me this 8th day of July, A. D. 1878.

[L.S.] (Signed) ROBERT A. BAIN,
County Judge.

Endorsed:

No. 155—The Cañon City and San Juan Railway Company vs Denver and Rio Grande Railway Company. Second amendment to bill. Filed July 10th, A. D. 1878.

(Signed) EDWARD F. BISHOP, Clerk.

CROSS-BILL OF COMPLAINT OF THE DENVER AND RIO GRANDE RAILWAY.

FOLIO

And afterwards, and on, to-wit, the 12th day of July, A. D. 1878, came again the said defendant by H. A. Risley, Esq., its Solicitor, and filed in said court its cross-fill of complaint against the said complainant, and the said cross-bill is in words and figures as follows, to-wit:

CROSS-BILL OF COMPLAINT OF THE DENVER AND RIO GRANDE RAILWAY.

1 UNITED STATES OF AMERICA, }
236 DISTRICT OF COLORADO, } ss.

In the Circuit Court of the United States for the District of Colorado, in the Eighth Circuit of the July term, A. D. 1878.

To the Judges of the Circuit Court of the United States for the District of Colorado, in the Eighth Circuit:

The Denver and Rio Grande Railway Company, a corporation organized and existing under the laws of the late Territory, now State of Colorado, brings this its bill against The Cañon
2 City and San Juan Railway Company, a corporation organized and existing under the laws of said late Territory and State, and thereupon your orator complains and says that on or about the twenty-seventh of October, A. D.
237 1870, William J. Palmer, Alexander C. Hunt and William H. Greenwood made their certificate in writing, by them severally subscribed and sealed, setting forth, among other things, that it was their desire to form a company, and be a body corporate under and by virtue of the provisions of chapter eighteen of the Revised Statutes of the then

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Territory of Colorado, for the objects and purposes therein set forth; that the corporate name
3 of said company should be the Denver and Rio Grande Railway Company, and that its object should be to locate, construct, operate and main-
238 tain, among other railway and telegraph lines therein mentioned, the Denver and Rio Grande Railway, commencing at Denver, Colorado, and running thence by the route in said certificate designated, to a point on the Arkansas river at or above Pueblo, thence up the valley of the Arkansas river to a point at or near Cañon City; thence continuing up the valley of the Arkansas, through the Big Cañon of the same, to a point at or near
4 the mouth of the South Arkansas; thence by the route in said certificate designated, to the valley of the Rio Grande, and thence down the valley of the Rio Grande to El Paso, in the
239 State of Chihuahua; that the term of existence of said company should be fifty years from the filing of their said certificate, and that the operations of said company should be carried on in the several counties upon the route above mentioned, and on or about the day of the date of their said certificate, the said Palmer, Hunt and Greenwood did subscribe and acknowledge before William H.
5 Townsend, a Notary Public of the county of Arapahoe, in said Territory, several originals of said certificate, and did cause the same, with the certifi-
240 cate of acknowledgment thereof thereto appended, or thereon written, to be filed, one in the office of the Secretary of said Territory, and one in the office of the County Clerk of each county upon the route of said railway, and wherein the busi-

CROSS-BILL OF COMPLAINT OF THE DENVER AND RIO GRANDE RAILWAY.

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ness of said corporation was by the terms of their said certificate to be conducted, and by virtue of
6 the said certificates and the certain acts of Congress hereinafter mentioned, the plaintiff became, and still is, a corporation for the purposes therein mentioned; and for greater certainty plaintiff craves leave to refer at the hearing to some certi-
241 fied copy of said certificates: that afterwards, and on or about the eighth day of June, A.D. 1872, the Congress of the United States, by a certain act entitled, "An act granting the right of way through the public lands to the Denver and Rio Grande Railway Company," did provide among other things, that the right of way over the public domain, one hundred feet in width, on each side of the track, together with such public lands ad-
7 jacent thereto as might be needful for depots, shops and other buildings for railroad purposes, and for yard room and side tracks, not exceeding
242 twenty acres at any one station, and not more than one station in every ten miles, and the right to take from the public lands adjacent thereto, stone, timber, earth, water or other material for the construction and repair of its railway and telegraph line, should be and the same was thereby granted and confirmed unto this plaintiff by its corporate name aforesaid, and that all the rights, powers
8 and franchises conferred by the laws of said Territory of Colorado on corporations created under them, for constructing and operating railroads and telegraph lines were thereby ratified and con-
243 firmed to this plaintiff by its name aforesaid, and that the same rights, powers and franchises conferred by the general incorporation laws of the Territory of

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Colorado for the construction of railroad and telegraph lines were thereby granted to this plaintiff, for the extension and operation of its railway and telegraph lines in and through any contiguous territory of the United States to the northern
9 boundary line of Mexico, provided that this plaintiff should complete its railway to a point on the Rio Grande as far south as Santa Fé within
244 five years of the passage of said act, and should complete fifty miles additional south of said point in each year thereafter, and that in default thereof the rights and privileges therein granted should be null and void, so far as might respect the unfinished portion of said road. And by the said act, and by a certain other act of Congress approved March 3d, 1875, and entitled "An act to correct a clerical error in 'An act granting the right
10 of way through the public lands to the Denver and Rio Grande Railway Company,' approved
245 June eighth, 1872," plaintiff was recognized as a lawful corporation from the date of its incorporation under the laws of Colorado, with all the powers, privileges and franchises by the said laws conferred, from the date of its said incorporation.

That afterwards and by the certain other act of Congress, approved on the third day of March, 1877, (which plaintiff shows was passed and ap-
11 proved at the special instance of plaintiff), entitled "An act to amend an act entitled 'An act granting the right of way through the public lands to the Denver and Rio Grande
246 Railway Company,'" approved June 8th, 1872, it was enacted that the period of five years mentioned in the act of Congress, first before recited,

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should be and was extended to ten years from the passage of said first mentioned act, and plaintiff for greater certainty craves leave to refer at the hearing to some copy of said several acts, published by authority of law. Plaintiff further
12 shows that at the date of the passage of said first mentioned act of Congress, the certificate of incorporation of plaintiff, hereinbefore set forth, was matter of record at the said Territory of Colorado, in the public offices before mentioned and the
247 provisions thereof and the purpose for which the plaintiff was incorporated and the route of the said Denver and Rio Grande Railway as in said certificate set forth, and all thereof, were, as this plaintiff is informed and believes, well known to the
13 Congress and President of the United States, and all said several acts were passed at the instance and request of the plaintiff. That at the date of said first mentioned act of Congress, the Big Cañon of the Arkansas was and the same still is, through the whole length thereof, situate on the public domain of the United States and through the distance of one and one-quarter miles or
248 thereabouts of the length of said cañon, the same was not nor is exeeeding forty-five feet in width or thereabouts, and through the said distance the same was and still is enclosed by precipitous mountains of granite two thousand feet or thereabouts in height on each side of the cañon, and
14 in the course of said cañon through the narrow portion thereof last mentioned, which plaintiff shows is commonly called and known as the Big Cañon or the box part of said cañon, or the Royal Gorge, are many abrupt angles and curves,

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so that by reason of the narrow and crooked course of said cañon through the close or narrow part
249 thereof, aforesaid, not more than one railway can be structed through the said narrow part of said cañon, except by locating the track of one of said railways across the track of the other in many places, nor without great and constant danger
15 of collision of the trains operated by said railways nor can more than one railway with a way of the width in said acts of Congress granted to plaintiff be constructed through the said gorge or narrow part of said cañon, all of which was at the
250 date of the passage of said acts of Congress and each thereof, well known to the Congress of the United States and then was, and ever since then hath been matter of common notoriety in the late Territory and now State of Colorado, and hath been, during all the time aforesaid, well known to all those assuming to be the officers and mana-
16 gers of the said defendant.

Plaintiff further avers that relying upon the rights and franchises by the acts of Congress before mentioned granted to it, and especially upon the grant of way and the right of way through the Big cañon of the Arkansas, which,
251 by reason of the premises, plaintiff is advised by counsel was, and was intended to be an exclusive right to occupy said cañon for the purposes of its said railway, plaintiff, in the years of our Lord 1871 and 1872, having before that time located
17 its railway from Denver aforesaid to Pueblo in the county of Pueblo, and the same being then in the course of construction between those places, did survey and locate its railway by the route men-

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tioned in said certificate, from Cañon City in the county of Fremont up the said Arkansas valley throúgh the Big cañon of the Arkansas, and from
252 Pueblo aforesaid to said Cañon City, and did, throughout the whole length of said survey, designate its line upon the ground by substantial stakes marked with figures and characters to indicate the purpose thereof as commonly used
18 by engineers in locating railroads, and did, by its engineers and servants, firmly place and set the said stakes in the ground, and in the said gorge or narrow part of said cañon, in the crevices of the rocks enclosing the same, one at the end of each one hundred feet or thereabouts of the line of said
253 railway as surveyed as aforesaid, and at the upper end of said Big cañon of the Arkansas, and in said narrow part or gorge, did erect retaining walls and excavate, fill, grade and build the bed and grade of its said railway in a permanent and substantial manner for about the distance of four
19 hundred feet along the line thereof, and the said grade and structure throughout the whole length thereof hath there ever since remained and now still remains, and the same with the stakes set as aforesaid in and through the said gorge have
254 always afforded notice to all the world of the said survey, and of the location of plaintiff's line of railroad in and through the said cañon, and of plaintiff's purpose and intent to build and construct its said railway through the said cañon—all which matters and things, the plaintiff avers, were ever since the year 1872 well known to
20 those assuming to be and acting as the officers and managers of the said so called Cañon City

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and San Juan Railway Company, or some of them; and plaintiff shows that about the year 1875, relying upon the rights, privileges and franchises granted as aforesaid by the before
255 recited acts of Congress, plaintiff did construct and build its said railway from Pueblo aforesaid, by the valley of the Arkansas, to Cañon City in the county of Fremont, two miles or thereabouts, and no more, from the mouth of said Big cañon of the Arkansas, thus forming a continuous line
21 upon its chartered route from Denver to Pueblo, and thence up the valley of the Arkansas to or near the mouth of the Big cañon, and from thence its route was staked out as aforesaid through the Big cañon, and the stakes set and placed by
256 plaintiff in and through the said cañon remained, unless some of them may have been by some accident removed or destroyed, and were found remaining by the defendant and the evil-minded persons acting under the name of the defendant when they unlawfully entered upon the line of plaintiff's road, as hereinafter mentioned, and one
22 or more of those stakes they tore up and heaved away, and obliterated the marks of plaintiff therefrom and put their own thereon.

Plaintiff further shows that the said Cañon City is situated immediately upon the said Arkansas
254 river, and from the said Cañon City to the mouth of the said South Arkansas, in the articles of association of this plaintiff mentioned, there is not, nor was there any practicable route for the construction of plaintiffs' railway, save through the said cañon of the Arkansas, and neither at the
23 said Cañon City nor in the vicinity thereof, was

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or is there any railway connection for the road of plaintiff, nor in the valley of the said Arkansas river, above the said Cañon City, nor anywhere in the vicinity of the said Arkansas valley was there at any time heretofore, nor is there any railway whatsoever, either begun or completed, save the
255 road of plaintiff, and the road of the said defendant hereinafter mentioned, neither at the said Cañon City nor in the vicinity thereof, nor for eight miles or thereabouts below, is or ever was there any traffic sufficient to employ the road of plaintiff, or any railroad whatsoever, nor is or
24 ever was there any prospect of such traffic derived from the country about or tributary to said Cañon City; that the valley of the said Arkansas river, at the said Cañon City, and for eight miles or thereabouts below that, doth not exceed in width one mile or thereabouts, and without and beyond the said valley for the distance of
256 twenty-five miles or thereabouts on the south side thereof, and for the distance of forty-five miles or thereabouts, from said valley on the north side thereof, and above the said Cañon City, for the distance of thirty miles, or thereabouts, al-
25 ways were and are save and except the Hardscrabble and a few other like narrow and poor valleys, only barren and sterile mountain wastes, nor in all the said country, save as aforesaid, is there any inhabited country, and only by penetrating to the valley of the Arkansas above the said cañon, and thence to the valley of the Rio Grande river, could or did the said plaintiff ever expect to make
257 that part of its said railway reaching to Cañon City aforesaid, eight miles or thereabout in length,

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of any value—all of which matters are and always were, since the year of our Lord 1875, well known to those acting as, and assuming to be the principal officers and managers of the said defendant, or some of them.

26

And plaintiff is advised by counsel that the same are and always were manifest and sufficient notice to all the world of the intent and purpose of plaintiff to construct and complete its said railroad through the said cañon of the Arkansas.

Plaintiff further shows that it hath always fully proposed and intended to build and complete its said line of railway from Cañon City aforesaid through the said Cañon of the Arkansas, to the mouth of the South Arkansas, and thence by the line, in its said certificate of incorporation mentioned, to the valley of the Rio Grande.

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27

And the plaintiff had well hoped that it would be permitted to continue and complete its said railway by the line in its said certificate of incorporation mentioned without such unlawful interference as hereinafter mentioned, but now, so it is, may it please your honors, that on or about the seventeenth day of February, in the year of our Lord 1877, Ebenezer T. Alling, John Locke and M. N. McGrue, of Cañon City, in the county of Fremont aforesaid, well knowing the premises, but contriving to injure and defraud the plaintiff, did make, subscribe, seal and acknowledge and cause to be recorded in the office of the County Clerk of Fremont county in the State of Colorado, and in the office of the secretary of the said State of Colorado, a certain certificate, a copy of which is attached hereunto, marked Exhibit A, and

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CROSS-BILL OF COMPLAINT OF THE DENVER AND RIO GRANDE RAILWAY.

FOLIO

prayed to be taken as a part hereof, and by virtue of the said certificate the said defendant claims and pretends that it is a corporation duly organ-
29 ized and existing; and on or about the
260 day of , A. D. 1877, as plaintiff is informed, and believes, the said defendant, or those assuming and pretending to be and acting as such corporation, did at the instance and for the benefit of the Atchison, Topeka and Santa Fé Railway Company, hereinafter mentioned, procure to be made a survey of some part of the line of railroad in the said certificate of incorporation mentioned, and on or about the day of 1877, did cause to be made a plat and profile of
30 the said railroad, and did file the same with the registrer of the land office of the Pueblo land dis-
261 trict in the said State of Colorado, wherein the line of said railroad is situate, and by virtue thereof the said defendant, or those who are assuming to be and acting as such corporation, pretend that in pursuance of the certain act of Congress, entitled an act granting to railroads the right of way through the public lands of the United States, approved March 3d, 1875, the said defendant is entitled to build, maintain and operate the
31 railroad in said certificate of incorporation mentioned, and to occupy the said cañon for the purpose aforesaid, and to exclude plaintiff therefrom.

The plaintiff, in fact, saith that the said defen-
262 dant is only a fictitious organization, created and existing by the direction of the Atchison, Topeka and Santa Fé Railway Company, a corporation of the State of Kansas, and without authority in the State of Colorado, but which seeks under the

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disguise of the name of the defendant to enter the State of Colorado, and construct and maintain
32 for its own benefit the said line of railway, and deprive the plaintiff of its lawful rights, and plaintiff saith that in making the said surveys, the said defendant, and the said Atchison, Topeka and Santa Fé Railway Company and those acting in the name of the plaintiff in that behalf, proceeded by stealth, and in order to deceive plaintiff and
263 put plaintiff off its guard, the president of the said Atchison, Topeka and Santa Fé Railway Company did advise plaintiffs' chief officers that in making said surveys there was no purpose to
33 usurp or invade the rights of plaintiff, and by this deceit induced plaintiff to believe that in making the said surveys neither the said defendant nor the said Atchison, Topeka and Santa Fe Railway Company, nor those acting in the premises in that behalf, had any secret purpose to invade the rights of the plaintiff, but the plaintiff, in fact, saith that the said Kansas company and all their officers and agents and the said defendant, and all those
264 assuming to be and acting as the principal officers and managers of said defendant, then and long
34 before well knew of the acts of Congress hereinbefore recited, and of the rights of the plaintiff thereunder, and of its intention to continue the construction of its said railroad, and to occupy therewith the said Grand Cañon of the Arkansas, and was only prevented and delayed in so doing by its poverty.

Plaintiff further shows that on or about the nineteenth day of April last past, it had prepared to continue the construction of its said railway

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through the said Grand Cañon of the Arkansas, and for that purpose, with its engineers and serv-
265 ants, proceeded to the said cañon, and thereupon the said Atchison, Topeka and Santa Fé Railway
35 Company, being informed that the plaintiff was prepared to and would proceed with the construction of its said railway through the said cañon, and would build and complete the same through the said cañon unless prevented by force, the said Atchison, Topeka and Santa Fé Railway Company, with the connivance and consent of the defendant, brought a great number of servants from the lines of its road in Kansas and Colorado, and occupied the line of the plaintiffs' road before that located and staked, as hereinbefore mentioned in the open parts of said cañon, and by violence
36 attempted to drive out and exclude the plaintiffs'
266 servants from all parts of said cañon, and in the name of defendant to occupy said cañon and absorb and engross the rights of the plaintiff therein, and being unable by force to accomplish this, their unlawful purpose, the said Atchison, Topeka and Santa Fé Railway Company, in the name of the said defendant, and with the consent and connivance of the said defendant, exhibited a certain complaint in the District Court of the State of Colorado, in and for the county of Fremont, and thereupon without notice to or hearing of the
37 plaintiff, procured from the County Judge of the said county of Fremont, who the plaintiff shows was and is wholly under the influence of the said
267 Atchison, Topeka and Santa Fé Railway Company, a certain writ of injunction prohibiting plaintiff from working upon its said railway, and because

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plaintiffs' servants did not nor would thereupon remove from the line of its railway through the said cañon, and surrender possession thereof to the servants of said Atchison, Topeka and Santa Fe Railway Company, the said defendant, or the said Atchison, Topeka and Santa Fé Railway Com-
38 pany, with the consent and connivance of said defendant, did procure from the said County Judge divers general warrants, not specifying any person by name, but directing the Sheriff of said
268 county of Fremont to arrest all employees of the plaintiff which should be found in the said cañon, and by virtue of such illegal warrants did cause great numbers of the employees of the plaintiff to be arrested on pretense of violation of the said injunction.

Plaintiff further shows that afterwards, on petition of plaintiff, the said cause was removed into
39 this honorable court, and is now still pending herein, and the said defendant hath exhibited in this honorable court its amended bill of complaint against plaintiff, and therein and thereby prays that the now plaintiff be restrained from
269 entering upon the line of said defendant's railroad, as located and platted in the land office of the Pueblo land district, or any part or parcel of the tract one hundred feet in width on each side of the centre line thereof, and from interfering with any of the servants or employees of the said defendant in working upon the said line of road, and from passing along the line of said road, and
40 from doing any act or thing calculated or intended to hinder or obstruct the said employees of defendant in the prosecution of work in the con-

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struction of said road, and that plaintiff be restrained from surveying, locating, or attempting
270 to survey or locate any line of railroad, or from constructing or attempting to construct any line of railroad over or upon said tract of one hundred feet on each side of the line claimed to have been located by said defendant, and from taking any timber, material or stone therefrom, and from continuing to hold, keep or possess any part or parcel of said tract along the line of said defendant's
41 road, and in and by defendant's said amended bill of complaint the said defendant pretends and claims that it is a corporation duly organized under the laws of the State of Colorado by virtue of the certain certificate of the said Ebenezer T.
271 Alling and his associates hereinbefore mentioned, and is entitled to all the rights and privileges given and granted to corporations duly organized and existing under and by virtue of the certain act of Congress entitled "An act granting to railroads the right of way through the public lands of the United States," approved March 3d, 1875;
42 that it hath surveyed and located the line of road mentioned in its said certificate of incorporation, and caused a plat and profile thereof to be made, and hath procured the approval thereof by the Secretary of the Interior, and hath filed the same with the register of the land office, where said line is located; and that by virtue of the said last men-
272 tioned act of Congress—to build and construct the line of railroad in its certificate of incorporation mentioned, through the said Grand cañon of the Arkansas, and exclude plaintiff therefrom, and that said defendant is ready and anxious to

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43 build and construct its said railroad, and that on the said nineteenth day of April last past it was in the actual occupation of its said surveyed and located line of road, grading and constructing said railroad, and that plaintiff forcibly entered and dispossessed it thereof and destroyed its said grade, the contrary of all which plaintiff expressly charges to be the truth, and that the said cer-

273 tificate of the said Alling and his associates, if effectual to confer upon the said defendant corporate capacity, doth not entitle them to apply for or have the benefits of the said act of Congress;

44 that if any such survey of the said defendant's line was ever made, the defendant and the said Atchison, Topeka and Santa Fe Railway Company and all those acting in the name of said defendant in that behalf proceeded therein by stealth and with the assurance, as hereinbefore set forth, to the chief officers of the plaintiff, that the same was not made with intent to interfere with the rights of plaintiff, and upon information and belief plaintiff

274 charges that if any such survey was made in any part of the said defendant's line, such survey was

45 not made or completed throughout the whole length of the said line; that if such survey of the said line was made through the gorge or narrow part of the said Grand cañon, the same was not definitely nor certainly marked on the ground, or that if any stakes were set or placed to mark the line thereof, the same were set and placed in the ice upon said river in the winter season, and were afterwards necessarily carried away by the high waters of the next ensuing spring, and that if any such profile, plat or map of the said supposed

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275 survey was ever filed in the office of the register of said land office, the same did not, nor doth in
46 any manner show or set forth with certainty upon what particular part of the public domain, or of any of the subdivisions thereof, the said defendant's line was or is in any part located, and the said plat or profile, if any, hath since by the said defendant been withdrawn out of the said land office and caused to be filed in this court, and the same is now in the office of the clerk of this court remaining. And plaintiff states and charges the truth to be that since the filing of the defendant's said amended bill said Kansas corporation,
276 or others acting by and with the connivance and consent of defendant, have changed and shifted
47 the line of survey marked upon said plat and profile, and now threaten and propose to occupy said cañon and construct said railroad upon such new line. That the said defendant doth not, nor do any of those assuming to be the officers and members thereof, intend or expect, nor did they ever intend or expect to build said railroad, or any part thereof, nor have they or any of them, nor hath the said defendant, nor will it have, if all its stock shall be fully paid in, in cash, means sufficient to construct more than five (5) miles of said
277 railroad, but those acting as and assuming to be the said defendant corporation formed the said cor-
48 poration, and now connive at the wrongful acts of the said Atchison, Topeka and Santa Fé Railway Company solely for the purpose of enabling the said Atchison, Topeka and Santa Fe Railway Company to construct the said railway and operate the same as its own for its own benefit.

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All of which actings and doings are contrary to equity. In consideration whereof, and because your orator can only have relief in the premises in this honorable court, where such matters are properly cognizable and relievable, to the end
49 therefore that the said defendant may answer this
278 the defendant's bill of complaint, but not upon oath, and show, if it can, why plaintiff should not have the relief hereinbefore prayed; that the said defendant, its agents, officers, servants and confederates may be perpetually restrained from interferring with plaintiff in any manner in the construction of its road along its route from the completed portion at Cañon City, through the Arkansas Cañon to the mouth of the South Arkansas River; and that they and each of them be restrained and enjoined from entering upon the right of way of plaintiff as fixed and defined by
50 the acts of Congress aforesaid, and the char-
279 ter of plaintiff; and from constructing or attempting to construct or operate any railway within the said cañon upon the line set down in the plat and profile of defendant; and from changing or attempting to change the said line, or to construct any railway in whole or in part upon any other line than that set down in said plat or profile; and that they and each of them do absolutely retire from and abandon all use and occupation of the same, and abstain from digging up the earth, stone, gravel or material to be found on the plaintiff's said right of way, and that they restore the
51 stakes of plaintiffs set upon its said right of way,
280 and removed by them, and restore the same as

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the same were at the time of their entry upon the plaintiff's said right of way, or, plaintiff protesting that defendant hath no right upon the plaintiffs' said right of way, if in the opinion of the court the defendant has the right of entry in said cañon that such right shall be defined by decree of the court to be subservient to and subordinate to the estate and right of the plaintiff therein, and only to be exercised without in any manner interfering
52 with the occupation of said cañon and right of way, as the plaintiff shall elect to use and convert
281 the same, and in no respect or manner to interfere with, obstruct, hinder or delay the plaintiff in the enjoyment of its right of way in the construction of its road, and the use and operation of the the same, and that the plaintiff may have such other and further relief in the premises as to equity and good conscience doth belong.

May it please your honors to grant to your orator not only the writ of subpœna issuing out of this honorable court directed to the said Cañon City
53 and San Juan Railway Company, commanding it on a day certain therein named to be and appear in this honorable court and answer all and singu-
282 lar the premises, and stand to and abide such further order, direction and decree as may be made against it, but also the most gracious writ of injunction issuing out of and under the seal of this honorable court, directed to the said Cañon City and San Juan Railway Company, defendant, its agents, officers servants and every of them, strictly restraining them from in any way interfering with the plaintiff in the construction of its road along
54 its route from the completed portion at Cañon

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City through the Arkansas Cañon to the mouth of the said South Arkansas river, and that they
283 and each of them strictly refrain and desist from entering upon the right of way of plaintiff as fixed and defined by the acts of Congress aforesaid and the charter of plaintiff, and that they and each of them do absolutely retire from and abandon all use and occupation of the same, and abstain from digging up the earth, stone, gravel or other material to be found on the plaintiffs' said right of way
55 until the further order of the court in the premises, and as in duty bound, plaintiff will ever pray, etc.

(Signed) THE DENVER AND RIO GRANDE RAILWAY COMPANY.
By HANSON A. RISLEY, Solicitor,
Of Colorado Springs.

284 J. P. USHER, of Lawrence, Kansas.
E. T. WELLS,
E. L. SMITH,
THOS. MACON, of Denver, Col., of Counsel.

(Signed ROB'T. F. WEITBREC, Treasr. D. & R. G. Ry. Co.

[L.S.] Attest: (Signed) WM. WAGNER, Secy. D. & R. G. Ry Co

UNITED STATES OF AMERICA,
DISTRICT OF COLORADO.

Robert F. Weitbrec, being duly sworn, says on oath that he is the Treasurer of the Denver and Rio Grande Railway Company, plaintiff in the
285 foregoing bill, and hath been such officer, and acting as such officer of said plaintiff company during nearly two years last past, and during that time hath had and now hath general charge of the

EXHIBIT "A"—ARTICLE INCORPORATION C. C. & S. J. R. R. CO.

FOLIO

work of construction and the construction department of said company, and by reason of the said office and his connection aforesaid with the business and affairs of said company, he hath acquired and hath a full and competent knowledge of the matters set forth in said bill of complaint, and that all the matters of fact set forth in the foregoing bill of complaint are true to the knowledge of deponent, except as to those matters which are
286 therein stated upon the information and belief of the complainant, and as to those matters he has been so informed and believes it to be true.

(Signed) ROBT. F. WEITBREC.

Sworn to and subscribed before me this 11th day of July, A. D. 1878, at Denver, in the district aforesaid.

[L. s.] (Signed) EDWARD F. BISHOP,
Clerk Circuit Court United States.
By HENRY SPARNICK, Deputy.

EXHIBIT "A"—ARTICLE INCORPORATION C. C. & S. J. R. R. CO.

Know all men by these presents: That the under-
287 signed, Ebenezer T. Alling, John Locke and M. N. Megrue, of Cañon City, Fremont county, Colorado, have associated themselves together for the purpose of forming a corporate body, under and by virtue of the provisions of the general incorporation laws of the State of Colorado, the same being contained in chapter eighteen (18) of the Revised Statutes of the Territory (now State) of Colorado, approved January 10th, 1868, and the acts amendatory thereto, and to carry on the business

EXHIBIT "A"—ARTICLE INCORPORATION C. C. & S. J. R. R. CO.

FOLIO

of a railroad company under the provisions granted by the laws aforesaid, for the specific purposes hereinafter set forth:

I. The name of the company shall be "*The*
288 *Cañon City and San Juan Railway Company.*"

II. The objects and purposes of said company are to construct, improve and maintain a railroad to carry passengers and freight between Cañon City, in the county of Fremont, and the point known as the South Arkansas postoffice, in the county of Lake in the said State of Colorado, commencing at the company's depot site in Cañon City, to be hereafter selected; thence up the valley of the Arkansas river, through the Grand Cañon thereof; thence by the most practicable route, following the Arkansas river, to the point known as the South Arkansas postoffice, in the
289 county of Lake aforesaid, with full power and authority to buy lands and tenements, and to receive the same by gift or demise, for the successful, convenient and profitable running of the said railroad, and for depots, side tracks and workshops, and for any and all other purposes that may be desirable or profitable, with full power to convey, alien and encumber the same in whole or in part, and to sell the stock of the company.

III. The termini of said railroad shall be Cañon City in said county of Fremont and the point known as the South Arkansas postoffice in
290 the said county of Lake in the State of Colorado.

IV. The capital stock of said company shall be one hundred thousand dollars, to be divided into one thousand shares of one hundred dollars each.

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V. The principal place of business of said company shall be Cañon City in the said county of Fremont.

VI. The number of trustees of said company who shall manage the business concerns of said company for the first year, shall be nine (9) and shall consist of the following named persons, to-wit: Ebenezer T. Alling, James Clelland, Henry
291 R. Holbrook, Benjamin F. Rockafellow, John Locke, M. N. Megrue and William F. Bailey, Fred. A. Raynolds, Sam. P. Dale.

VII. The officers of said company shall consist of a President, Secretary and Treasurer, and until a regular election is held as provided by law, Ebenezer T. Alling shall be President, Benjamin F. Rockafellow shall be Secretary, and James Clelland shall be Treasurer.

VIII. The term of existence of said company shall be twenty (20) years.

IX. The trustees shall have the power to make such by-laws and regulations from time to
292 time as in their judgment shall be advisable for the successful management of the affairs of the said company.

X. An impression of the seal adopted by the said company as its corporate seal is hereto attached.

In witness whereof, we the undersigned have hereunto set our hands and seals this 15th day of February, 1877.

[L. S.]	EBENEZER T. ALLING,	[SEAL.]
	JOHN LOCKE,	[SEAL.]
	M. N. MEGRUE,	[SEAL.]

SUBPŒNA ON CROSS-BILL.

FOLIO

Endorsed:

293 No. 155.—Circuit Court.—The Cañon City and San Juan Railway Company versus the Denver and Rio Grande Railway Company. Cross-bill. Filed July 12th, A. D. 1878.

EDWARD F. BISHOP, Clerk.

By HENRY SPARNICK, Deputy.

WELLS, SMITH and MACON.

And thereupon and on the same day, to-wit: the 12th day of July, A. D. 1878, the following SUBPŒNA was issued out of said court and in said cause, to-wit:

SUBPŒNA ON CROSS-BILL.

UNITED STATES OF AMERICA, } ss.
DISTRICT OF COLORADO. }

294 *The President of the United States of America to the Cañon City and San Juan Railway Company—Greeting:*

We command you, that you appear before our Judges of our Circuit Court of the United States of America, for the District of Colorado, at the city of Denver, in said District, on the first Monday in September next (it being the 2nd day of September, A. D. 1878), to answer the cross bill of complaint of The Denver and Rio Grande Railway Company, this day filed in the office of the Clerk of said Court, in said city of Denver, then
295 and there to receive and abide by such judgment and decre as shall then or thereafter be had upon said bill of complaint, upon pain of judgment being pronounced against you by default, and a decree had and entered accordingly.

MEMORANDUM.

FOLIO

To the Marshal of the District of Colorado to execute, and make due return.

Witness, the Hon. Morrison R. Waite, Chief [L.S.] Justice of the Supreme Court of the United States of America, and the seal of our Circuit Court of the United States, for the District of Colorado, at the city of Denver, aforesaid, this 12th day of July, inthe year of our Lord, one thousand eight hundred and seventy-eight, and of the Independence of the United States, the 103d year.

(Signed) EDWARD F. BISHOP, Clerk.

MEMORANDUM.

296 The above named defendant is hereby notified that unless it shall enter its appearance in the office of the Clerk of said Court, at the city of Denver, aforesaid, on or before the day to which the above writ is returnable, the complainant's bill will be taken against it as confessed, and a decree entered accordingly.

(Signed) EDWARD F. BISHOP, Clerk.

MARSHAL'S RETURN.

DISTRICT OF COLORADO, } ss.

DENVER, July 18th, A. D. 1878.

I have duly executed the within writ, by delivering a true copy thereof to B. F. Rockafellow, Secretary of the within named, The Cañon City and San Juan Railway Company, at Denver, in Arapahoe county, in said District, on the 18th day of June, A. D. 1878.

297 (Signed) P. P. WILCOX, Marshal.

CROSS BILL.

FOLIO

Gen. No. 155.—Circuit Court of the United States, for the District of Colorado. The Denver and Rio Grande Railway Company vs. The Cañon City and San Juan Railway Company. Chancery subpœna. Returnable to rule day, first Monday in September, A. D 1878. (Signed) Edward F. Bishop, Clerk. Filed this 19th day of July, A. D. 1878. Edward F. Bishop, Clerk. By Henry Sparnick, Deputy Clerk. Risley, Wells,
298 Smith and Macon, Complainant's Solicitor.

And afterwards and on, to-wit, this 12th day of July, A.D. 1878, came again the said complainant, by Charles E. Gast, Esq., its solicitor, and filed in said court and in said cause a certain *stipulation as to answer, evidence*, etc., and the said stipulation is in words and figures as follows, to-wit:

STIPULATION AS TO ANSWER, EVIDENCE, ETC.

UNITED STATES OF AMERICA,
EIGHTH JUDICIAL CIRCUIT,
DISTRICT OF COLORADO.

In the Circuit Court of the United States for the
299 District of Colorado.

THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY
—versus—
THE DENVER AND RIO GRANDE RAILWAY COMPANY.

Now come the parties to the above entitled cause, by their respective attorneys, and by leave of court first had and obtained, stipulate as follows:

That the answer of the defendant herein may be filed on or before the incoming of court on

FOLIO

Monday, July 15th, 1878. That after issue framed, the evidence to be taken in the cause of the Denver and Rio Grande Railway Company against E. T. Alling et al. now pending in this court and involving the same matters of controversy, so far
300 as the said evidence is pertinent to the issues herein, may stand and be considered as proofs in this cause upon the final hearing.

(Signed) CHAS. E. GAST,
Solicitor for Complainant.

(Signed) THE DENVER AND RIO GRANDE RAILWAY COMPANY.
By H. A. RISLEY, Solicitor,
Colorado Springs, Col.

Endorsed:

No. 155.—Cañon City and San Juan Railway Company versus the Denver and Rio Grande Railway Company. Stipulation. Filed July 12th, A.D. 1878.

EDWARD F. BISHOP, Clerk.
By HENRY SPARNICK, Deputy.

301 And afterwards, and on the same day, to-wit, the 12th day of July, A.D. 1878, came again the said complainant, by Hanson A. Risley, Esq., its Solicitor, and filed in said court and in said cause its answer, and the said answer is in words and figures as follows, to-wit:

ANSWER.

FOLIO 1.

UNITED STATES OF AMERICA,
DISTRICT OF COLORADO,

In the Circuit Court of the United States for the District of Colorado, of the July term, A. D. 1878.

ANSWER.

FOLIO

THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY.—*Plaintiff.*
—versus—
THE DENVER AND RIO GRANDE RAILWAY COMPANY.—*Defendant.*

302 The answer of the Denver and Rio Grande Railway Company, defendant, to the amended bill of complaint of the Cañon City and San Juan Railway Company, complainant.

This defendant reserving to itself all right of exception to the said bill of complaint for answer
2 thereto or to so much and such parts thereof as this defendant is advised is or are material or necessary for it to make answer unto, answering saith:

This defendant denies that the said complainant is, or at any time since the seventeenth day of February, A.D. 1877, has been a body corporate duly organized or existing under the laws of the State of Colorado, or otherwise, or doing business in the county of Fremont in said state, or else-
303 where, save as hereinafter stated.

Denies that said plaintiff was duly incorporated in manner as in the said amended bill of com-
3 plaint, stated though this defendant admits that on or about the seventeenth day of February, A. D. 1877, Ebenezer T. Alling, John Locke and M. N. Megrue, of Cañon City, in the county of Fremont, did make, subscribe, seal and acknowledge and cause to be recorded in the office of the County Clerk of Fremont county, in the State of Colorado, and in the office of the secretary of the said State of Colorado, their certain certificate, a copy of which, as this defendant believes, is attached
304 to the said amended bill of complaint, and therein

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4 referred to as exhibit A, though for greater certainty defendant craves leave to refer to the original, or some duly authenticated copy of said certificate when produced at the hearing.

Admits that the said Ebenezer T. Alling and others, his associates, pretend to be a corporation by the name of the Cañon City and San Juan Railway Company, by virtue of the aforesaid certificate and the acknowledgment and record thereof, but this defendant is advised by counsel that inasmuch as the said certificate doth not set forth the name of the town or place and county in which the principal office of the corporation
5 therein and thereby proposed to be formed will be
305 kept, the same if effectual to confer any rights or corporate capacity whatsoever upon the parties therein named, or their associates of the said so-called Cañon City and San Juan Railway Company doth not entitle them, or any of them, to apply for or have benefit of the act of Congress of March 3d, A. D. 1875, in said amended bill mentioned.

This defendant admits it to be true that at or about the time in the said bill mentioned, the said Ebenezer T. Alling and his associates, assuming to be a corporation, and acting as such
6 corporation under the name of the Cañon City and San Juan Railway Company, did, at the instance and for the benefit of the Atchison, To-
306 peka and Santa Fé Railway Company hereinafter mentioned, procure to be made a survey of some part of the line of railroad in the aforementioned certificate designated; but upon information and belief denies that they or any of them or the said

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plaintiff, did survey or locate the line of said railroad throughout the whole of the length thereof; and defendant avers that the President of said Atchison, Topeka and Santa Fe Railway Company, at the time of said survey, in order to deceive this defendant and throw it off its guard, gave assurance to the chief officer of this defendant, that in making said survey there was no intention to invade the rights of this defendant.

7

And upon information and belief defendant avers that if they, or any of them, or the said plaintiff did survey or locate said railroad through the narrow part of the cañon of the Arkansas, in the said amended bill mentioned, commonly called the Royal Gorge, or did locate or assume or attempt to locate the line of said railroad through the said narrow part or gorge of said cañon, the same was not designated or located as in the said amended bill of complaint mentioned, nor was the same in any manner certainly located or designated or marked on the ground—avers that the survey of said line, if any was made within the said narrow part of said cañon, was made in the winter season, and the stakes, if any, were set and placed in the ice of said river, so that the same were necessarily carried away by the high water of the next following spring.

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Defendant denies that the said plaintiff did then, or at any time, proceed with all practicable diligence, or otherwise, to the construction of said road on the line in said certificate mentioned, by grading as in the said amended bill mentioned, or otherwise—denies that the said plaintiff made or did any such grading as in the said amended bill

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mentioned—denies that any such grade hath at any time been, or at the date of exhibiting the said amended bill of complaint, was in possession
309 of said complainant rightfully or otherwise—denies that the said plaintiff hath complied with the provisions of the laws of Colorado relating to incorporations, and upon information and belief denies that the stockholders in said corporation have paid in their proportion of the stock subscribed by them, as required by law.

This defendant hath been informed and believes
10 that at some time before the exhibiting of the said amended bill of complaint, those acting in the name of the said plaintiff, and assuming to be the principal officers and managers of such corporation, did cause to be made what purports to be a plat and profile of the railroad in said amended bill of complaint mentioned, and did
310 file the same with the Register of the Land Office as in said amended bill mentioned, annd this defendant hath been informed that the said plat bears what purports to be an endorsement in
11 writing thereon by the Secretary of the Interior, expressing his approval thereof; but whether the said plat and profile or either thereof were thereupon or at any time noted upon the plats in the said land office this defendant is not informed save in and by the said bill of complaint, and hath no knowledge or belief touching the allegation of the bill in that behalf, and prays for strict proof thereof; and this defendant avers that neither by
311 the said plat and profile nor by any other memorandum, certificate or writing filed therewith
12 doth it appear upon what particular portion of the public domain of the United States, or of the

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several sections, quarter sections or other sub-divisions thereof, or any of the said sub-divisions, the said railroad is in any part located; and this defendant denies that the said complainant or those acting in the name of or assuming to be the said Cañon City and San Juan Railway Company, or any of them, is or are entitled to or hath or have acquired any right of way as in the said amended bill mentioned, or is or are legally pos-
13 sessed thereof or any part thereof through the public domain of the United States.

This defendant, further answering, saith that after the filing of the said plat and profile with the
312 register of said land office, the said plaintiff voluntarily withdrew the said plat and profile from the said land office, and hath ever since retained and kept the same therefrom, and hath caused the same to be filed in this court; and defendant avers that by reason of such withdrawal and detention of said plat and profile the said plain-
14 tiff hath, and all persons whomsoever claiming by virtue thereof have lost and relinquished all rights whatsoever which they or any of them at any time had or claimed in the way and line of
313 railway in said plat described over the lands of the public domain.

Defendant, further answering, admits that it claims to be and avers that it is a corporation existing under the laws of the State of Colorado and under the laws of the United States, but
15 denies that this defendant at the time in the said amended bill mentioned or at any time entered upon or invaded any part of the line of railroad in the said amended bill mentioned then being in the possession of the said plaintiff. Admits that

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the line of the railroad in said amended bill mentioned for a part of the distance of twenty miles, as described in said certificate and in said plat and
314 profile, runs through what is called the Grand cañon of the Arkansas river; that said cañon is
16 very narrow and enclosed in precipitous rocks, and that the difficulties in the way of survey and establishment of the grade of any railroad through said cañon are very great. Denies that the said plaintiff had at the date of exhibiting its said amended bill, or now hath or at any time hath had a large number or any number whatsoever of men employed, or that the said plaintiff or those acting as and assuming to be the said Cañon City and San Juan Railway Company were ready
17 and anxious to proceed to the construction and
315 operation of the railroad in the amended bill mentioned. Admits that defendant had then in its employ a large number of men, and that said employees, or some of them, had been furnished with fire-arms and ammunition, but solely as a means of self-defense against assaults theretofore committed and threatened to be repeated upon or against them by the servants and employees of the Atchison, Topeka and Santa Fe railway Company, hereinafter mentioned; and the servants
18 and employees of this defendant, or some of them, may, for anything the defendant knows, have
316 made exhibition of such fire-arms, but denies that they, or any of them, had, at any time, to the knowledge, information or belief of this defendant, threatened to shoot the servants and employees of the said plaintiff, or any of them; believes that the servants of this defendant may have made such threats against the servants and

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employees of the Atchison, Topeka and Santa Fe
19 Railway Company, but only in case they should assault the servants of defendant or attempt forcibly to dispossess and exclude them from the line of defendant's railway then lawfully occupied by them, the said servants of this defendant. Denies that the defendant's servants were making or had made any such threats against any person or
317 persons whomsoever, if they should attempt to hold possession or work upon any portions of the line of said road then in their possession; though
20 defendant admits that its said servants and employees did prevent the servants and employees of the Atchison, Topeka and Santa Fe Railway, hereinafter mentioned, from working upon or occupying the narrow parts of the said Grand Cañon of the Arkansas, the same being then and always theretofore in the absolute and exclusive possession of this defendant and its said servants and employees and did prevent the servants of the said Atchison, Topeka and Santa Fe Railway Company from passing up said narrow cañon.
21 Denies that they prevented any person from
318 conveying provisions to the employees of any body above the narrow part of said cañon. Admits that the part of said cañon, occupied and held by this defendant and its employees at the date of exhibiting the said amended bill of complaint, is the narrowest part of said cañon where the greatest amount of labor and the longest time would be required to construct a road and that
22 this defendant, by holding possession thereof, was preventing the employees of the said Atchison, Topeka and Santa Fe Railway Company from working therein, though defendant denies that it

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or its employees to the knowledge, information or
319 belief of this defendant ever prevented any employees of the plaintiff named in the said amended bill of complaint or of those assuming to be such corporation from working in said cañon or any part thereof. Denies that this defendant hath never acquired any right of way
23 over the said line in the said amended bill of complaint mentioned and therein averred to be the line of the complainant, and denies that this defendant hath no right to occupy or possess the said line. Denies that its attempt so to do is in violation of the rights of the complainant or of any person or persons whomsoever.

This defendant further answering, saith that on
320 or about the twenty-seventh day of October, A.D. 1870, William J. Palmer, Alexander C. Hunt and
24 William H. Greenwood made their certificate in writing, by them severally subscribed and sealed, setting forth among other things that it was their desire to form a company and be a body corporate under and by virtue of the provisions of chapter eighteen of the Revised Statutes of the then Territory of Colorado for the objects and purposes thereinafter set forth; that the corporate name of said company should be The Denver and Rio Grande Railway Company, and that its
25 object should be to locate, construct, operate and maintain among other railways and telegraph lines therein mentioned, the Denver and Rio
321 Grande Railway, commencing at Denver, Colorado, and running thence by the route in said certificate designated, to a point on the Arkansas river at or above Pueblo; thence up the valley of the Arkansas river to a point at or near Cañon

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City; thence continuing up the valley of the Ar-
26 kansas, through the Big Cañon of the same, to a point at or near the mouth of the South Arkansas; thence by a route in said certificate designated, to the valley of the Rio Grande, and thence down the valley of the Rio Grande to El Paso, in the State of Chihuahua; that the term of existence of said company shonld be fifty years from the filing of their said certificate, and that the operations of said company should be carried
322 on in the several counties upon the route above mentioned; and on or about the day of the date
27 of their said certificate, the said Palmer, Hunt and Greenwood did subscribe and acknowledge before William H. Townsend, a Notary Public of the county of Arapahoe in said Territory, several originals of said certificate, and did cause the same, with the certificate of acknowledgement thereof thereto appended or thereon written, to be filed, one in the office of the secretary of said territory, and one in the office of the County Clerk
28 of each county upon the route of said railway, and
323 wherein the business of said corporation was, by the terms of their said certificate to be carried on; and by virtue of these said certificates and the certain act of Congress hereinafter mentioned, the defendant became and still is a corporation for the purposes therein mentioned; that afterwards, and on about the eighth day of June, A. D. 1872, the Congress of the United States, by a certain act, entitled "An act granting the right of way through the public lands to the Denver and Rio Grande
29 Railway Company," did provide, among other things, that the right of way over the public domain, one hundred feet in width on each side of

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the track, together with such public lands ad-
324 jacent thereto as might be needful for depots, shops and other buildings for railroad purposes, and for yard room and side tracks not exceeding twenty acres at any one station, and not more than one station in every ten miles, and the right to take from the public lands adjacent thereto
30 stone, timber, earth, water or other material for the construction and repair of its railway and telegraph line should be and the same was thereby granted and confirmed unto this defendant by its corporate name aforesaid, and that all the rights, powers and franchises conferred by the laws of said Territory of Colorado on corporations created under them for constructing and operating rail-
325 roads and telegraph lines were thereby ratified
31 and confirmed to this defendant by its name aforesaid, and that the same rights, powers and franchises conferred by the general incorporation laws of the Territory of Colorado for the construction of railroad and telegraph lines were thereby granted to this defendant for the extension and operation of its railway and telegraph lines in and through any contiguous territory of the United States to the northern boundary line of Mexico, provided this defendant should com-
32 plete its railway to a point on the Rio Grande as far south as Santa Fé within five years from the passing of said act, and should complete fifty miles additional south of said point in each year thereafter, and that in default thereof the rights and privileges therein granted should be null and
326 void so far as might respect the unfinished portion of said road. And by the said act, and by a certain other act of the Congress of the United States

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33 approved March 3d, A.D. 1875, and entitled "An act to correct a clerical error in an act granting the right of way through the public lands to the Denver and Rio Grande Railway Company, approved June 8th, 1872," this defendant was recognized as a lawful corporation from the date of its incorporation under the laws of Colorado, and all the powers, privileges and franchises by the said laws conferred upon this defendant were thereby expressly ratified, confirmed and legalized as ex-

34 isting from the date of its said incorporation: that

327 afterwards and by the certain other act of Congress, approved on the third day of March, A. D. 1877, which defendant avers was enacted at the petition of this defendant, entitled "An act to amend an act entitled *An act granting the right of way through the public lands to the Denver and Rio Grande Railway Company*, approved June 8th, 1872, it was enacted that the period of five years mentioned in the act of Congress first before recited should be, and was, extended to ten years

35 from the passage of the said first-mentioned act.

This defendant further answering saith that at the date of the passage of the said first-mentioned act of Congress the certificate of incorporation of this defendant hereinbefore set forth was matter of record at the said Territory of Colorado in the public offices before mentioned, and the provisions thereof and the purposes for which the plaintiff

328 was incorported, and the route of the said Denver and Rio Grande Railway as in the said certificate

36 set forth and all thereof were, as this defendant is informed and believes, well known to the Congress and the President of the United States.

The defendant, further answering, saith that at

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the date of the said first mentioned act of Congress the Big cañon of the Arkansas was, and the same still is, through the whole length thereof, situated on the public domain of the United States, and through the distance of one and one-quarter miles or thereabouts of the length of said
37 cañon the same was not nor is exeeeding forty-five feet in width or thereabouts, and that through the said distance the same was and still is enclosed by precipitous mountains two thousand feet or thereabouts in height on each side of said cañon,
339 and in the course of said cañon through the narrow portion thereof last mentioned, which this defendant shows is commonly called and known as the Box cañon or the box part of said cañon or the Royal gorge, are many abrupt angles and curves, so that by reason of the narrow and
38 crooked course of said cañon through the close or narrow part thereof aforesaid, not more than one railway can be constructed through the said narrow part of said cañon except by locating the track of one of said railways across the track of the other in many places, nor without great and constant danger of collision of the trains operated by said railways, nor can more than one railway with a way or right of way of the width in said acts of Congress granted to this defendant, be
39 constructed through the said gorge or narrow
340 part of said cañon—all of which was at the date of the passage of said acts of Congress and each thereof well known to the Congress of the United States, and then was and ever since hath been matter of common notoriety in the late Territory and now State of Colorado, and hath been during all the time aforesaid well known to those assum-

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ing to be the officers and managers of the plaintiff and acting in the name of said Cañon City and San Juan Railway Company, or some of them.

40 This defendant, further answering, saith that relying upon the rights, privileges and franchises by the acts of Congress before mentioned granted to it, and especially upon the grant of way and the right of way through the Big cañon of the Arkansas (which by reason of the premises the defendant is advised by counsel was, and was
341 intended to be an exclusive right to occupy said cañon for the purposes of its said railway), this defendant, in the years of our Lord 1871 and
41 1872, having before that time located its railway from Denver aforesaid to Pueblo in the county of Pueblo, and the same being then in the course of construction, did survey and locate its railway by the route mentioned in said certificate, from Cañon City in the county of Fremont up the said Arkansas valley through the Big cañon of the Arkansas, and from Pueblo aforesaid to said Cañon City, and did throughout the whole length of said survey designate its line by substantial
42 stakes such as are commonly used in like cases, and did by its engineers and servants place and set the said stakes, one at the end of each one hundred feet of the line of said railway as sur-
342 veyed as aforesaid.

And at the upper end of said Big Cañon of the Arkansas, and in said narrow part or gorge, did erect retaining walls, and excavate, fill, grade and build in a permanent and substantial manner the bed and grade of its said railway for about the
43 distance of four hundred feet along the line thereof, and the said grade and structure throughout

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the length thereof, four hundred feet or thereabouts, as aforesaid, hath there ever since remained, and now still remains, and the said grade and structure, and the stakes set as aforesaid in and through the said gorge, have ever since the erection and placing thereof afforded notice to all
343 the world of the said survey, and of the location of defendant's line of railroad in and through the
44 said cañon, and of this defendant's intent to build and construct its said railway through the said cañon—all which this defendant avers was ever since the year 1872, well known to those assuming to be and acting as the officers and managers of the said plaintiff, the Cañon City and San Juan Railway Company, or some of them; and about the year 1875 this defendant, relying upon the rights, privileges and franchises granted as afore-
45 said by said acts of Congress, having before that
344 completed its said railway from Denver aforesaid to Pueblo, did complete and put in operation its said railway from Pueblo aforesaid by the valley of the Arkansas, to Cañon City, in the county of Fremont, two miles or thereabouts and no more, from the mouth of said Big Cañon of the Arkansas.

This defendant further answering, saith that the said Cañon City is situated immediately upon said Arkansas river, and from the said Cañon City to
46 the mouth of the said South Arkansas, in the articles of association of this defendant mentioned, there is not nor ever was any practicable route for the construction of this defendant's railway, save
345 through the said cañon of the Arkansas; and neither at the said Cañon City or in the vicinity thereof, was or is there any railway connection

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for the road of this defendant, nor in the valley of the said Arkansas river above the said Cañon
47 City, nor anywhere in the vicinity of the said Arkansas valley was there, at any time heretofore, nor is there any railway whatsoever, either completed or begun, save the road of this defendant, and the said Cañon City and San Juan Railway, in the bill mentioned; neither at the said Cañon City nor in the vicinity thereof, nor for eight miles or thereabouts below, is or ever was there any traffic sufficient to employ the road of this
346 defendant or any railroad whatsoever, nor is or
48 ever was there any prospect of such traffic derived from the country about or tributary to the said Cañon City.

This defendant further answering, saith that the valley of the said Arkansas river at the said Cañon City, and for eight miles or thereabouts below that, doth not exceed in width one mile or thereabouts; and without and beyond the said valley for the distance of twenty-five miles or thereabouts therefrom, on the south side thereof, and for the distance of forty-five miles or there-
49 abouts, from said valley on the north side thereof, and above said Cañon City for the distance of
347 thirty miles or thereabouts, always were, and are, save and except the Hardscrabble and a few other like narrow and poor valleys, only barren and sterile mountain wastes; nor in all the said country, save as aforesaid, is there any inhabited or productive country, and only by penetrating to the valley of the Arkansas above the said cañon, and
50 thence to the valley of the Rio Grande river, could or did the said defendant ever expect to make that part of its said railroad, reaching to

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Cañon City aforesaid, eight miles or thereabouts in length, of any value—all which matters are, and always since the year of our Lord 1875, were well known to those acting as and assuming to be the principal officers and managers of the said
348 plaintiff, or to some of them.

And defendant is advised by counsel that the
51 same are and always were manifest and sufficient evidence to all those acting and assuming to be the members, officers and managers of the said plaintiff and to all the world of the intent and purpose of this defendant to construct and complete its said railroad through the said cañon of the Arkansas.

This defendant further answering saith that it hath always fully purposed and intended to build and complete its said line of railway from Cañon
52 City aforesaid through the said cañon of the
349 Arkansas to the mouth of the South Arkansas, and thence by the line in its said certificate of incorporation mentioned to the valley of the Rio Grande and that on or about the nineteenth day of April last past this defendant began to and did resume the work of constructing its said railway, and on or about the day and year last aforesaid when this defendant had prepared to and was about to resume the construction of its said rail-
53 way through the said Grand Cañon of the Arkansas, The Atchison, Topeka and Santa Fe Railway Company, a corporation organized and existing, as this defendant is informed and believes, by and under the laws of the State of
350 Kansas and not by or under the laws of the State or late Territory of Colorado, pretending that the said Cañon City and San Juan Railway Company

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was a corporation duly organized and existing by
54 virtue of its certificate of incorporation in the amended bill in this behalf mentioned and was entitled to locate and build a railroad from Cañon City aforesaid through the said cañon of the Arkansas, contriving to defraud and injure this defendant and to anticipate and prevent this defendant from occupying the said cañon and building a railway through said cañon or else to com-
351 pel this cefendant to enter into some unfair and extortionate traffic arrangement and contract with
55 it, the said Atchison, Topeka and Santa Fe Railway Company, did, with a large force of servants and laborers, begin to locate and construct the grade of a railroad from Cañon City aforesaid towards the said cañon of the Arkansas and in and through the open portions of the said Big cañon below the gorge or narrow part thereof aforesaid, and with their servants aforesaid occupying the last mentioned portions of said cañon or parts
56 thereof, did begin to locate and construct the grade of a railroad upon and along the same line
352 theretofore surveyed, located, staked and designated by this defendant as hereinbefore mentioned, and at the date of exhibiting the said bill of complaint the said Atchison, Topeka and Santa Fé Railway Company with a large force of its servants and laborers was engaged in constructing a line of railroad in that portion of the said cañon of the Arkansas last mentioned, occupying the
57 line of this defendant aforesaid; that this defendant was then still occupying the said narrow part or gorge of said cañon and excluding the said Atchison, Topeka and Santa Fé Railway Company, its laborers and servants therefrom, and was

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with its laborers and servants, without using
353 unnecessary force, endeavoring to re-occupy and to gain possession of that part of its aforesaid line of railroad then unlawfully occupied by the said Atchison, Topeka and Santa Fé Railway Company as this defendant lawfully might; and defendant avers that these are the same supposed
58 wrongs and grievances in the said bill of complaint mentioned, and not other or different.

This defendant, further answering, saith that the said Atchison, Topeka and Santa Fe Railway Company in and about the grading and construction of said railroad are acting solely for
354 themselves and not for the said corporation which is named as plaintiff in this suit; that the said railway if completed will be the road and prop-
59 erty of the said Atchison, Topeka and Santa Fé Railway Company, and not of the said Cañon City and San Juan Railway Company; that the said last mentioned corporation, if there be any such corporation, hath not and will not have, if all its stock be or shall be paid up, money sufficient to construct more than five miles of the said line of railroad in the bill mentioned; that as this defendant is informed and believes, sixty thousand dollars or thereabouts of the stock of said The
355 Cañon City and San Juan Railway Company hath
60 been issued full paid solely for and in consideration of the survey and platting of some part of said line of railroad in the said amended bill mentioned; that plaintiff is, as defendant is informed and believes, without money or credit, and neither said plaintiff or those assuming to be the officers or members thereof or any of them intend or expect, or ever did intend or expect, to build

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said railroad or any part thereof; but those acting as and assuming to be such corporation
61 formed the said corporation, and now connive at the wrongful acts of the said Atchison, Topeka and Santa Fé Railway Company solely for the
356 purpose of inducing said Atchison, Topeka and Santa Fe Railway Company to construct the said line of railroad, and with the intent and expectation that said last named corporation, and not said Cañon City and San Juan Railway Company, shall own, control and operate the same

This defendant further answering saith upon
62 information and belief, that since the filing of said amended bill of complaint the engineers and servants of the said Atchison, Topeka and Santa Fe Railway Company, or others assuming to act for the plaintiff at divers places in and along said cañon of the Arkansas and in the narrow part thereof aforesaid, have changed and shifted the line of the
357 said railway in said amended bill mentioned, and therein alleged to have been surveyed and located by the plaintiff, and that in divers places said line hath so been shifted and removed to the distance
63 of one hundred and twenty-five (125) feet, or thereabouts, from the line surveyed and located as in the bill mentioned.

And upon information and belief defendant avers that the said Atchison, Topeka and Santa Fe Railway Company have lately, and since the filing of the said amended bill, issued from their office in Boston, Massachusetts, a proclamation or circular setting forth, among other things, in substance,
358 that a company therein designated as the Pueblo
64 and Arkansas Valley Railroad Company have decided to extend their railroad from Pueblo to

FOLIO

Leadville, and from the San Juan mining district, and to build during the present year from Cañon City to South Arkansas, a distance of fifty-seven miles, and that the said extension when built will be placed under lease to the said Atchison, Topeka and Santa Fe Railway Company. A copy of which said circular is hereunto attached, marked exhibit A, and prayed to be taken as part hereof.

65 And this defendant avers that the railroad in said proclamation mentioned from Cañon City to South Arkansas is the same railroad in the said amen-

359 ded bill mentioned, to the construction and operation whereof it is in the said amended bill averred the said plaintiff is ready and anxious to proceed with all possible dispatch; and the said defendant avers that whatever name or disguise the said Atchison, Topeka and Santa Fe Railway Company may assume, it is the said last men-

66 tioned corporation and not the said Cañon City and San Juan Railway Company which is assuming and attempting to build and construct the railroad in said amended bill mentioned, and to interfere with the rights of this defendant.

300 This defendant further answering admits that all the property of this defendant is encumbered by trust deeds or mortgages for considerable sums of money, but whether the amount of said encum-

67 brance is equal to the full value of said property this defendant doth not and cannot certainly know, but defendant believes that the value of its franchises, rights and estate, real and personal, largely exceeds the amount of said incumbrances.

Denies that, to the best knowledge, information and belief of this defendant, this defendant is insolvent.

FOLIO

Defendant further answering saith that it hath
68 already perfected financial arrangements for the
361 construction of its railway from Cañon City to the mouth of the South Arkansas aforesaid, or near thereunto, and this defendant hopes and expects, if permitted, to build and construct its said railway and put the same in operation without delay.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith it is by the said bill charged, without this,
69 that there is any other matter, cause or thing in the said complainant's bill of complaint contained, material or necessary, for this defendant to make answer unto and not herein and hereby well and
362 sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge or belief of this defendant, all which matters and things this defendant is ready and willing to aver, maintain and prove as this honorable court shall
70 direct, and humbly prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

(Signed)

THE DENVER AND RIO GRANDE RAILWAY COMPANY.
By HANSON A. RISLEY,
Solicitor, of Colorado Springs.

(Signed) ROB'T F. WEITBREC,
Treas. D. and R. G. R. W. Co.

363 [L.S.] Attest: (Signed) WM. WAGNER,
Sec'y D. and R. G. R'y Co.

J. P. Usher, of Counsel.
E. T. Wells, E. L. Smith, Thos. Macon, of Counsel.

ANSWER.

FOLIO

UNITED STATES OF AMERICA,)
DISTRICT OF COLORADO,)

71 Robert F. Weitbrec, being duly sworn, says on oath that he is the Treasurer of the Denver and Rio Grande Railway Company, defendant in the above entitled cause and hath been such officer of said defendant company during nearly two years last past; and during that time hath had and now hath general charge of the work of construction and the construction department of said defendant, and by reason of his said office and
364 his connection aforesaid with the business and affairs of said company, he hath acquired and hath a full and competent knowledge of the mat-
72 ters set forth in said answer, and that all the matters of fact set forth in the foregoing answer are true to the knowledge of deponent, except as to those matters which are therein stated upon the information and belief of the complainant, and as to those matters he has been so informed and believes it to be true.

(Signed) ROB'T F. WEITBREC.

Sworn to and subscribed before me, this 11th day of July, A. D. 1878, at Denver, in the District aforesaid.

365 (Signed) EDWARD F. BISHOP,
[L.S.] Clk. Ct. Ct., U. S.
73 By HENRY SPARNICK, Deputy.

EXHIBIT "A."

Thomas Nikerson, Pres. Geo. L. Goodwin, Asst. Treas.

Office of the Atchison, Topeka and Santa Fe Railroad Co. Equitable Building, Room 24. No. 150 Devonshire street. P. O. Box 2746.

BOSTON, June 22, 1878.

CIRCULAR NO. 42.

FOLIO

The Pueblo and Arkansas Valley Railroad Company have decided to extend their railroad, under their present charter, from Pueblo to Leadville and the San Juan mining district, and to build this year from Cañon City to South Arskansas, a
366 distance of fifty-seven miles, the estimated cost of
74 which is $750,000.

It is proposed to raise the money by the issue of first mortgage 7 per cent. gold bonds with coupons payable semi-annually, limited to $14,000 per mile of completed road, including rolling stock. This subscription is limited to $770,000, and the company offer to subscribers for $1,100 in cash eleven shares of the capital stock of the Pueblo and Arkansas Valley Railroad Company, of the par value of $100 each, and $1,000 in the
367 first mortgage bonds of the company, each stock-
75 holder owning twenty-seven shares being entitled to subscribe for eleven shares of said stock; and all subscriptions must be made for $1,100, or multiples thereof.

This extension, when built, will be placed under lease to the Atchison, Topeka and Santa Fe Railroad Company on the same terms and conditions as the present line from Kansas to Pueblo. This subscription is now offered to stockholders of record June 25, 1878, of the Pueblo and Arkansas
368 Valley Railroad Company until 12 o'clock July
76 10 proximo. Any part of the subscription not taken on or before that date will be allotted on the same terms by the directors of the Pueblo and Arkansas Valley Railroad Company to such parties as may desire to subscribe for the same on or before july 15.

The subscription is payable as the same may be

CIRCULAR NO. 42.

FOLIO

assessed by the directors, but not more than twenty per cent. shall be assessed in any one month.

The bonds will be executed and delivered to
369 the subscribers as the road is completed in sec-
77 tions of not less than twenty miles.

An interest account will be made with the subscribers at the rate of seven per cent. per annum in currency.

The New Mexico and Southern Pacific Railroad Company have decided to build their road from the north line of New Mexico, commencing at the Raton pass and running via Las Vegas to Albuquerque on the Rio Grande river, a distance of two hundred and forty-eight miles, the estimated cost of which is $2,621,000.

370 Said railroad company will issue a first mort-
78 gage 7 per cent. thirty year gold bond on its road, including rolling stock, interest payable semi-annually, and limited to $15,000 per mile of completed road. This bond will be further secured by a lease from the Atchison, Topeka and Santa Fe Railroad Company for thirty years, paying 37 per cent. of the gross earnings, and also a rebate of 15 per cent. on business delivered to and secured from said road at the state line of New Mexico, which rebate shall be reduced ratably as
371 the bonds are cancelled, but never below 10 per
79 cent, said rebate to be applied:

First. To pay any interest on said bonds not provided for by the earnings of said road under the lease.

Second. To the purchase by advertisement of

FOLIO

said bonds when they can be purchased at not exceeding 10 per cent above their par value, the bonds so purchased to be immediately cancelled and converted into stock for the benefit of the Atchison, Topeka and Santa Fe Railroad Company.

The Pueblo and Arkansas Valley Railroad
372 Company will contribute to the rebate in propor-
80 tion to the mileage which the business passes over its road.

The company offer to subscribers for $900 in cash nine shares of the capital stock of the New Mexico and Southern Pacific Railroad Company, of the par value of $100 each, and $1,000 in the first mortgage bonds of the company, each holder of twenty-nine shares of the Atchison, Topeka and Santa Fe Railroad Company stock being entitled to subscribe for nine shares of said stock—and all subscriptions must be made for $900 or multiples thereof.

A subscription is now open at this office, and is
81 offered to the stockholders of the Atchison, To-
373 peka and Santa Fe Railroad Company, of record June 25th until July 10th. Any part not taken on or before that date will be allotted on the same terms by the Directors to any parties who may desire to subscribe for the same.

The subscription is payable as the same may be assessed by the Directors, but not more than 20 per cent. shall be assessed in any one month. The bonds will be executed and delivered to the
82 subscribers as the road is completed in sections of not less than twenty miles.

An interest account will be made with the sub-
374 scribers hereto at the rate of seven per cent. per annum in currency.

REPLICATION.

FOLIO

Parties who have made subscriptions to the capital stock of this company under date of March 23d, 1878, will be allowed to transfer their subscriptions to the present plan at their option.

THOMAS NICKERSON,
President Atchison, Topeka and Santa Fe Railroad Company.

JOSEPH NICKERSON,
President Pueblo and Arkansas Valley Railroad Company.

THOMAS NICKERSON,
83 President New Mexico and Southern Pacific Railroad Company.

Endorsed:

375 No. 155—Circuit Court. Cañon City an San Juan Railway Company vs. The Denver and Rio Grande Railway Company. Answer. Filed July 12th, A. D. 1878.

(Signed) EDWARD F. BISHOP, Clerk.

By HENRY SPARNICK, Deputy.

WELLS, SMITH & MACON.

And afterwards and on to-wit: this 17th day of July, A. D. 1878, came again the same complainant, by Charles E. Gast, Esq., its solicitor, and filed in said court and in said cause its *replication* to the said answer of the defendants, and the said replication is in words and figures, as follows, to-wit:

REPLICATION.

In Circuit Court of the United States, Eighth Circuit District, and State of Colorado.

REPLICATION.

FOLIO

THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY—*Complainant*,
—versus—
376 THE DENVER AND RIO GRANDE RAILWAY COMPANY—*Defendant*.

The replication of the said Cañon City and San Juan Railway Company to the answer of said defendant.

This repliant saving and reserving to itself all and all manner of advantage of exception to the manifold insufficiencies of the said answer for replication thereto, saith, that it will aver and prove its said bill to be true, certain and sufficient in the law to be answered unto; and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by this repliant; without this, that any other matter or thing
377 whatsoever in the said answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true—all which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct: and humbly prays as in and by its said bill it hath already prayed.

C. E. GAST,
Solicitor for Compl't.
G. B. REED, WILLARD TELLER,
Of Counsel.

Endorsed:

155—In Circuit Court. The Cañon City and San Juan Railway Company versus the Denver and Rio Grande Railway Company. Replication. Filed July 17th, A. D. 1878.

(Signed) EDWARD F BISHOP, Clerk.

378 C. E. GAST, Solicitor for Compl't.

MOTION TO DISMISS CROSS-BILL.

FOLIO

And afterwards and on to-wit: the 18th day of July, A. D. 1878, came again the complainant (being the defendant in the said cross-bill) and filed in said court and in said cause *its motion to dismiss the said cross-bill herein*, and the said motion is in words and figures, as follows, to-wit:

MOTION TO DISMISS CROSS-BILL.

UNITED STATES OF AMERICA,
STATE OF COLORADO.

In the United States Circuit Court, Eighth Judicial Circuit, District of Colorado.

379 THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY—*Plaintiff*,
—versus—
THE DENVER AND RIO GRANDE RAILWAY COMPANY—*Defendants*,
In Chancery.

Now comes the plaintiff by Chas. E. Gast, its Solicitor, and moves the court to dismiss the pretended cross bill of defendant against the said plaintiff heretofore on the 12th inst., filed in said cause, for the following reasons, to wit:

First. That the same was filed without leave of court first had and obtained.

Second. That there was at the time of the filing of the said pretended cross bill, a cross bill already upon file in said cause, upon which there
380 had already been a preliminary hearing.

Third. That the said pretended cross bill asks no discovery and no relief, save and except the same as already asked in former bill.

Fourth. That there is no defense set forth in said cross bill that is not available by answer in said case.

(Signed) CHAS. E. GAST, Solicitor for Plaintiff.

ORDER.—CROSS BILL DISMISSED.

FOLIO

Endorsed:

155.—Circuit Court, U. S. Cañon City and San Juan Railway Company vs. Denver and Rio Grande Railway Company. Motion to dismiss cross bill. Filed July 18th, A. D. 1878. (Signed) Edward F. Bishop, Clerk. Chas. E. Gast, Solicitor for Plaintiff.

381 And afterwards and on to-wit: the 2d day of August, A. D. 1878, the same being one of the regular judicial days of the July term, A. D. 1878, of said court—present, the Honorable Moses Hallett, District Judge,—the following further proceeding was had and entered of record in said court and said cause, to-wit:

ORDER.—CROSS-BILL DISMISSED.

THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY –versus– THE DENVER AND RIO GRANDE RAILWAY COMPANY.	*In Chancery. For Injunction.*
382 THE DENVER AND RIO GRANDE RAILWAY COMPANY –versus– THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY.	*In Chancery. Cross-Bill.*

At this day comes the said complainant in the cross-bill herein, by T. Macon, Esq., its solicitor, and the said defendant in the said cross-bill, by G. B. Reed, Esq., its solicitor, also comes; and the motion of the said defendant to dismiss this cross-bill coming on now to be heard, and the court being now sufficiently advised in the premises, it is ordered by the court that the said motion be granted.

ORDER.—CROSS BILL DISMISSED.

FOLIO

Therefore it is ordered that this cross-bill stand dismissed at the cost of the said complainant to

383 be taxed.

And afterwards and on to-wit: the 12th day of August, A. D. 1878, the following transcript of testimony heard by the court in the cause wherein *the Denver and Rio Grande Railway Company is complainant* and *Ebenezer T. Alling et al. are defendants* was filed in the said last mentioned cause, to-wit:

The United States of America,
DISTRICT OF COLORADO.

IN THE

CIRCUIT COURT OF THE UNITED STATES

FOR THE

DISTRICT OF COLORADO,

OF THE JULY TERM, A. D., 1878.

THE DENVER AND RIO GRANDE RAILWAY CO. *Plaintiff.*

vs.

EBENEZER T. ALLING, et al., *Defendants.*

In Equity.

A report of the depositions of witnesses produced, sworn and examined, and the documentary evidence given, as well in behalf of the plaintiff as the defendants, in the above entitled cause, in open Court, before the Hon. Moses Hallett, District Judge of said District presiding, and under the control and supervision of said Court, on the twenty-second, twenty-third and twenty-fourth days of July, A. D. 1878, pursuant to the stipulations of counsel, filed in said Court on the 12th day of July, A. D. 1878, and on the .....day of....., 1878.

TESTIMONY FOR PLAINTIFF.

Present, Thomas Macon, Esq., of counsel, with the said plaintiff, Gilbert B. Reed, Esq.; Willard Teller, Esq., of counsel, with the defendants, and Charles E. Gast, Esq., defendants' solicitor.

Present, also, Henry L. Denison, named in the stipulation of counsel, and by whom said depositions were reduced to writing.

Present, also, the following named witnesses, respectively. And, thereupon, the following named witnesses being each severally sworn according to law in open Court, the following interrogatories were propounded by counsel, and the objections thereunto, below stated, were made, and the rulings and opinions of the Court below set forth were given by the Court upon such objections respectively, and the witnesses severally deposed as follows, to wit:

ON THE PART OF SAID PLAINTIFF.

M. N. Megrue, being duly sworn, deposed as follows:

FOLIO

1 Ques. Where do you reside?

Ans. Cañon City, Fremont county.

Ques. What position do you hold, if any, in the Cañon City and San Juan Railway Company?

Ans. I am one of the directors.

Ques. How long have you been one of the directors?

Ans. Since the organization of the Company.

Ques. Were you one of the original incorporators?

Ans. Yes, sir.

Ques. What is the capital stock of that Company?

Ans. I could not answer that, sir.

TESTIMONY FOR PLAINTIFF:

FOLIO

Ques. I mean by that, what is it limited at in the certificate?

Ans. Yes, sir; I understand what you mean, but I don't remember.

2 Ques. How many shares of stock, or what proportion of stock is now disposed of?

Ans. Could not tell that, either.

Objected that this is immaterial, irrelevant and not the best evidence, the amount of the capital stock should be shown by the certificate of incorporation, or in some manner.

Ques. What amount of money is there now in the treasury, so far as you know, of the Cañon City and San Juan Company?

Objected to as immaterial, and there is no issue on that. Objection sustained.

The Court: Parties may be working for them,
3 without any prospect of getting anything, as men do frequently who work for railroad companies: in that way it would not affect the validity of their acts.

Ques. State for what purpose the Cañon City and San Juan Railway Company was organized.

Objected, the certificate of incorporation is the best evidence; it shows for what purpose.

Mr. Macon proposed to show that the certificate of incorporation did not express the true object of the Company.

4 The Court: I don't think you can go into that, sir. Suppose they all had met together, and resolved they would do something entirely different, and then sat down and signed the certificate, what would that signify? We should take the certificate to be the exponent of their purpose, as

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to their particular intention at the time of making this certificate certainly can not be the subject of inquiry here. Suppose, on the other hand, they
5 should attempt to show that your Company, eight or ten years ago, all entertained a different purpose from what was then expressed in their certificate, certainly no one would contend that the Court should sit here and hear such evidence as that.

Ques. What is the Cañon City and San Juan Railway Company now doing towards building a road through the Grand Cañon of Arkansas?

Ans. Well, they have men at work there now, as I understand it.

Ques. Under whose control and management are these men at work in the Grand Cañon ?

6 Ans. Do you mean to say who has direct charge of them ; I understand Mr. Robinson, the chief engineer has charge of them.

Ques. What position does Mr. Robinson hold in the Atchison and Topeka Company ?

Objected to as immaterial.

Objection overruled.

Ans. Well, I have only a general understanding of that, and that he is the chief engineer of the Atchison and Topeka Road, I don't know that positively—general understanding.

Ques. Mr. Robinson has the immediate charge of the men now engaged in completing this work in the Cañon ?

Ans. He has the immediate charge as I understand it, yes sir.

Ques. Who pays those men for their work, and

who pays Mr. Robinson for his services immediately?

Objected to as immaterial.

Objection overruled.

Ans. I am acting as a director, yet I admit I am not thoroughly conversant with all the work-
7 ings of the company, but as I understand Mr. Robinson attends to that part as chief engineer, and that they are paid through the Cañon City and San Juan Railway Company.

Ques. The Cañon City Railway Company pays through Mr. Robinson?

Ans. Yes, sir.

Ques. Where does the Cañon City and San Juan Railway Company get its money from, from what source?

Objected to.

Objection overruled.

Ans. I understand it is from the sale of the bonds of the Cañon City and San Juan Railway Company.

8 Ques. You understand. Have you ever seen one of those bonds?

Ans. Yes, sir.

Ques. When were those bonds executed?

Ans. Well, I don't just understand what is the meaning of the question.

Ques. When were those bonds of the Cañon City and San Juan Company executed?

Ans. I could not answer that definitely, if I understand it, the stock and the bonds are the same thing in this case, are they not?

Ques. No.

Ans. Then I will take it back, and will say stock instead of bonds,

Ques. From the stock of the company then?

Ans. Yes, sir.

9 Ques. You don't know of any bonds ever having been issued by the company?

Ans. No, sir.

Ques. From what source, from what individual, or company does this money come into the possession of the Cañon City and San Juan Company? From whom do they get it, borrow it, or otherwise?

Ans. I don't know.

Ques. As a director you know of no arrangement between your company and any other company or individuals for the borrowing of money to be used in the construction of that road?

10 Objected to.

Objection sustained.

Ques. What arrangement, if any, do you know of having been made between the Cañon City and San Juan Company, or between any individual or company for money to be used in the construction of this railroad in the Grand Cañon?

Ans. Well, as I understand it, I am simply director, I suppose the secretary and treasurer would understand these things better than I do, but as I understand it, it has been made from sale of stock.

11 Question repeated.

Ans. I don't know of any other than that, the sale of stock.

Ques. How much of this stock do you own Mr. Megrue?

Objected to as immaterial.

Objection overruled.

Ans. I own one share.

Ques. How much did you pay for it?

Ans. A hundred dollars a share.

Ques. Shares of stock issued in certificates of one hundred dollars each?

Ans. Yes, sir.

Ques. How much did you pay for this?

Ans. Well, it would be a hundred dollars.

Ques. How much did you actually pay in money or services for this one share of stock?

11 Ans. I didn't pay anything in money for it.

Ques. Anything in services?

Ans. Yes, sir.

Ques Service as a director?

Ans. Yes, sir.

Ques. Now you may state what services as director you have performed up to this time?

Ans. I believe I have attended all their meetings except one.

Ques. How many meetings have there been?

Objected to as immaterial.

Objection overruled.

Ans. I could not tell, I have a memorandum
12 here from which I could tell though—six is all I have any knowledge of.

Ques. At any of those meetings has there been any corporate action taken for the raising of money for the building of this road?

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Objected, not the best evidence, not the way to prove corporate action.

Ans. As I understand they opened the books for the subscription of stock, and sold the stock to raise the money.

Ques. That is the only?

Ans. That I know of, yes, sir.

13 Ques. State if you know how much of the stock of your company was issued in payment for the survey of your route through the Grand Cañon and up the Arkansas River?

Ans. I would not be positive about it, but I remember of one of ten thousand dollars, and it may be more, but that I don't remember distinctly.

Ques. When was the construction of this railroad by the Cañon City Company, as you term it, begun?

Ans. That is, when was the work begun, do you mean to say? I will refer to a memorandum I have, here—on the 19th of April.

Ques. Of the present year?

14 Ans. Yes, this is the building only, the survey was begun long ago.

Ques. As one of the directors of this Company attending its meetings, how long before the 19th of April did you have the last meeting, to the best of your recollection, and where was it?

Ans. (Referring to memorandum). It is April the 10th.

Ques. What business was transacted at the time at that meeting?

Objected to.

Objection sustained.

Ques. What, if any, business was transacted at that time having reference to the immediate

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construction of your road through the Cañon?

15 Ans. Well, I can only answer that by answering the first question you asked. I believe I would say not any.

Ques. When did you elect your officers last?

Ans. It was the 10th of April, I think.

Ques. Now, as one of the directors of this Cañon City and San Juan Company, when did you first become aware that the Cañon City and San Juan Railway Company was building a road in, or through, the Grand Cañon?

Ans. I think it was the 18th or 19th of April.

16 Ques. From whom did you get your first information on the 19th day of April that your Company was then about to proceed to place men in that Cañon to work?

Ans. If it was on the 19th, I think it was either the 18th or the 19th, I got it from Mr. Clelland.

Ques. What arrangements, if any, had the Denver and Rio Grande Railway Company made on that day, before you saw Mr. Clelland, to go into that Cañon?

Objected to, sustained.

17 Ques. How many men were put to work on the 19th of April by your Company, as you understand it?

Objected to as immaterial, objection overruled.

Ans. I do not know.

Ques. Under whose charge were the men, put to work on the 19th of April, working on that day?

Ans. As I understand it, it was under Mr. Clelland.

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Ques. Who was the engineer, I meant?

Ans. That I don't know.

Ques. Do you know a man named W. R. Morley?

Ans. Yes, sir.

Ques. When did you first see and know him?

Ans. Well, it has been two or three years ago.

18 Ques. When did you first see him in Cañon City?

Ans. Well, I could not tell you that; it was prior to the 19th of April, though.

Ques What connection before the 19th of April had he with the Cañon City and San Juan Company?

Ans. I could not be positive about that; I don't know whether he was on the survey or not.

Ques. At this time you don't know of his holding any position in the Cañon City and San Juan Company?

19 Ans. No, sir.

Ques. Did you see him on the 19th of April?

Ans. No, sir.

Ques. Did you see him on the next day?

Ans. No, sir.

Ques. Do you know of his coming into Cañon on the 19th of April?

Ans. I heard of it; but I don't know of it.

Ques. I will ask you what, if anything, do you know of any contract between the Cañon City and San Juan Company and the Atchison and Topeka Railway Company by which the Cañon City and San Juan Company is to be furnished with

20 money by the Atchison and Topeka Railway Company for the construction of that road?

Objected to: first for the firm, and second, the

substance; it assumes that there is an agreement.

Objection overruled.

Ans. I do not know of any.

Ques. As one of the directors, I will ask you plainly who is to own that road through the Grand Cañon, that railroad when the same is constructed, as it is now being constructed and under the management of the present construction?

21 Ans. Well, I suppose the stockholders of the Canon City and San Juan Railway Company.

Ques. Has there ever been an estimate of the expense of the building of the first twenty miles of that railroad furnished the company by its engineer.

Objected to as immaterial.

Overruled.

Ans. Not to my knowledge. It may have been done.

Ques. A survey has been made has it, under the direction of the Canon City and San Juan Company?

Ans. Yes sir, and I have no doubt but what he may have made the report, but it is not to my knowledge.

Ques. Who is the Treasurer of your company?

22 Ans. Mr. James Clelland.

Ques. Do you know the expense of the construction of the road as far as it has gone up to this time?

Ans. No sir, I do not.

Ques. Have any estimates at all ever been laid before your company to your knowledge?

Ans. We have the surveyor's report, the only thing I have ever seen.

Ques. So far as it has been constructed, the

FOLIO

expense of the work done now?

Ans. No sir, not that I know of.

Ques. Has your company held any meetings since the 10th of April?

Ans. Yes sir.

Ques. Have you attended them?

Ans. Yes sir.

23 Ques. And there has been up to this time no estimates of the expense of the work laid before your company?

Ans. I think the 19th of April was the last meeting we held, but I won't be positive about that.

Ques. The day the road was begun?

Ans. Yes sir.

Ques. How many men, or about how many men were set to work on this road by your company as you understand it up to the 25th of April?

Ans. I don't have anything of a correct idea, at all.

Ques. I will get you to conjecture.

Objected to.

Objection sustained.

Ques. I will ask you if there were as many as three hundred?

Objection sustained.

24 Ques. I will ask you where the laborers engaged on the construction of this Cañon City and San Juan railroad came from, where were they brought from, when they were put upon the work?

Objection immaterial.

Overruled.

Ans. I could not tell.

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Ques. Were they to any extent gathered up from about Cañon City?

Ans. The first men that we set at work there were gathered up from Cañon City.

Ques. My question has reference to the majority of the force that were put upon that work before they were stopped by the injunction.

Ans. The majority of the men were not gathered there.

25 Ques. Who brought those men there, what company? Your company or some other company?

Ans. Well, as I understand it, they came there under Mr. Robinson.

Ques. How were they transported there?

Ans. It would be a difficult matter for me to tell.

Ques. Were they brought on the railroad, or did they come in wagons?

Ans. I think the majority of them came in wagons.

Ques. Whose teams were they so far as you know that brought the majority of the men to the cañon?

Ans. I don't know.

Ques. Do you know they belonged to the Cañon City and San Juan Company?

Ans. No sir.

26 Ques. What direct agency had the Cañon City Company in bringing those men into that place, and putting them at work about the 19th of April, or from the 19th to the 25th of April last?

Ans. I do not know.

Ques. As a director you took no action to-

wards putting those men in that cañon at all, did you?

Ans. No sir.

Ques. After those men were brought there and put in that cañon, and up the river to work, constructing this Cañon City and San Juan Railroad, as you call it, what control, management or direction, if any, did the Cañon City and San Juan
27 Railway Company exercise over these men?

Objected to.

Objection overruled.

Ans. As I understand it, the Chief Engineer had charge of them. I would like to refer to the question that was asked just before this. (Shorthand writer read.)

Ques. As a director you took no action towards putting those men in that cañon at all, did you?

Witness. I didn't answer correctly there, it was at the meeting on the 19th, we had a meeting to put those men at work there. We called
28 a meeting of the directory for the purpose of putting those men to work on the 19th.

Ques. You say those men. How many men, about; how many did you put in that day?

Objected to as immaterial.

Plaintiff's Counsel. I want to show that out of seven or eight hundred the Cañon City Company put in thirteen.

Objection sustained.

Ques. What action, if any, was taken by your company from the 19th to the 25th of April last toward advertising for men to work on that railroad?

Objected to as immaterial.

Objection overruled.

Ans. I think all that was done by the Chief
29 Engineer.

Ques. Of the Cañon City and San Juan or Atchison and Topeka?

Ans. Chief Engineer of the Cañon City and San Juan Railway Company.

Ques. Don't you know that advertisements were signed by Mr. A. A. Robinson as Chief Engineer of the Atchison, Topeka and Santa Fé Railway Company offering two dollars and a-half a day for men?

Ans. I don't remember that I ever saw any.

Ques. Don't you know they were stuck up all over that town and at the hotel and elsewhere?

Ans. Yes, I know they were stuck up there, but I don't remember who signed them, and Mr.
30 Robinson was elected Chief Engineer of the Cañon City Company. Hands witness notice beginning, "Wanted."

Ques. You saw that: when was he elected so: see if that is the Cañon City and San Juan Company, or is it the Atchison, Topeka and Santa Fé?

Ans. Well, it doesn't say.

Ques. What does it say? Objected to, the paper itself is better evidence,

Ques. He is not Chief Engineer of your company this time, is he?

Ans. That is my understanding. Yes sir.

Plaintiff offers in evidence hand-bill as follows:

"WANTED:—Five hundred men to work on the construction of the A. T. and S. F. R. R. Inquire at Clelland's and the Post Office. Wages,
31 $1 50 per day and board. A. A. Robinson,
Chief Engineer of Construction."

TESTIMONY FOR PLAINTIFF.

FOLIO

Ques. Since the 19th day of April, 1877 has the Cañon City and San Juan Company, as a Company, as a corporation, ever made a payment to the men employed in constructing this railroad in the Grand Cañon of the Arkansas?

Ans. I don't know anything about that, I don't have anything to do with it—that part of it.

CROSS-EXAMINATION OF MEGRUE.

Ques. You said Mr. Robinson was Chief Engineer of the Atchison, Topeka and Santa Fe Company; you also stated he was Chief Engineer
32 of the Cañon City and San Juan Railway Company?

Ans. I said I understood he was Chief Engineer of the Atchison, Topeka and Santa Fe.

Ques. State, if you know, when he was elected Chief Engineer of the Cañon City and San Juan Railway Company?

Ans. To the best of my recollection it was on the nineteenth of April.

Ques. At the time work commenced?

Ans. Yes sir.

Ques. You say the men that went to work were under the charge of Mr. Clelland, what position did Clelland occupy in your Company?

Ans. He was Treasurer.

Ques. You say you don't know anything in
33 regard to Mr. Morley. Do you know what Mr. Morley is by profession?

Ans. I understand, engineer.

Ques. Who has charge of the engineering department and the construction of your road?

Ans. Mr. Robinson.

Ques. If Mr. Morley was acting as an engin-

FOLIO

eer, he was acting under Mr. Robinson, was he not?

Ans. I don't know.

Ques. Mr. Robinson at that time had charge of the road, did he not?

Ans. He was elected on the 19th, yes sir.

Ques. Before that, I understand you say the work was under the charge of Clelland the Treasurer.

Ans. Yes, the beginning of the work was.

Ques. You say that you own one share of the
34 stock, and you paid no money for it, that you got it for services. Try and recollect that matter, and refresh your memory and see if you didn't get it from Mr. Rockafellow?

Ans. I got it from Mr. Rockafellow, yes sir.

Ques. Full paid stock?

Ans. Yes Sir.

Ques. Settled with Mr. Rockafellow for it?

Ans. Yes sir, I gave him a receipt for it.

Ques. Do you know how Mr. Rockafellow got the stock?

Ans. Well, yes, I know how I understand he got it, he got it for services and office rent, and so on, rent of building.

Ques. Didn't the Company rent an office from
35 Mr. Rockafellow?

Ans. Yes sir.

Ques. And paid him in stock for the use of the office?

Ans. That is my understanding of it.

Ques. And you obtained your stock from him?

Ans. Yes sir.

Ques. What other officers, if any, aside from

FOLIO

the directors were elected on the 19th of April, besides the chief engineer and directors; what other officers besides Mr. Robinson, if any, were elected on the 19th?

Ans. I don't remember.

Ques. Was not Mr. Strong elected on that date?

Ans. I could not say positively, sir.

Ques. Was he not elected on that date, general manager?

36 Ans. I believe he was, yes sir.

Ques. What other position did Mr. Strong hold in the Company, if any?

Ans. I don't remember of any other.

Ques. Was he not a director, was not Mr. Strong elected director on the tenth?

Ans. I think he was, but I would not say positively, I would have to refer to minutes of the book?

RE-EXAMINATION OF MEGRUE.

Ques. You say you got your certificate, one share of stock from Mr. Rockafellow, and gave him a receipt for it; did you get it from Mr. Rockafellow as an individual, or as the Secretary of the

37 Cañon City and San Juan Railway Company?

Ans. Well, as I understand it, I got it from him as Secretary of the Cañon City and San Juan Railway Company.

Ques. You did not trade for it, or buy it from him as his private property?

Ans. No sir.

Ques. You say the Company rented an office of Mr. Rockafellow, what building?

Ans. The building you used to occupy as an office.

Ques. How long did they occupy that room as an office for the Company.

Ans. I could not tell you, it was for a good while.

Ques. You don't remember how much it come to, do you?

38 Ans. No sir.

Ques. The room was worth about four dollars a month for rent?

Ans. I don't have any idea. Question objected to.

Ques. Mr. Robinson was elected on the 19th of April you say, after this building began, and when do you say Mr. Strong was elected a director?

Ans. I said at the time I didn't remember distinctly but I do since I spoke of it, that Mr. Strong was elected on the 10th day of April.

Ques. At the regular meeting?

Ans. Yes sir.

EBENEZER T. ALLING, SWORN.

Ques. What position, if any, do you hold in

39 the Cañon City and San Juan Railway Company?

Ans. The position of director.

Ques. How long have you been one of the directors?

Ans. Since May, '77.

Ques. What position in the directory did you hold last year before the election of April 10th, last?

Ans. I was president of the company.

Ques. What, if anything, had you to do with originally incorporating the company?

Objected to and question waived.

FOLIO

Ques. I believe you said you were president the year before the last election?

Ans. Yes, sir.

40 Ques. You may state what agency and interest, if any, the Atchison, Topeka and Santa Fé Railway Company had originally in the organization of your company?

Ans. I am not aware that they, as a company, had any.

Ques. In the organization of your company, what company, if any, except your own, was expected to build the road up through the Cañon, if any were built?

Objected to and objection sustained.

Ques. When you organized your company,
41 and since the organization of the company, has your company, as a company, from its own resources and means, expected to build a railroad through that Cañon?

Ans. Well, I think it has.

Ques. That was the purpose for which you organized in the first place to build a road through that Cañon?

Objected to. The object is shown by the certificate of incorporation.

Ans. Yes, sir.

Ques. Is your company building a road through there now?

Ans. So far as I know, it is, through its officers.

Ques. Where do you get the means to build with?

Ans. From the stockholders of the company,
42 so far as I know, and it is paid through its appointed officers.

Ques. Then you mean to say that the expenses of constructing the road through the Grand

FOLIO

Cañon and up the Arkansas River are drawn from the company itself, from its own resources?

Ans. So far as I know.

Ques You know then of no arrangement or agreement made by the company, your company, with any other person or company for the money to pay the expenses of the construction of this road.

Ans. I do not.

Ques. What is, at this time, the amount of money owned by your Company?

43 Objected to as immaterial. Objection sustained.

Ques. Since you have been director in that road, since the organization of your Company, have you ever known of the Company having a hundred dollars in money in the treasury?

Objected to, and objection sustained.

Ques. From what source does your Company derive means to pay for the construction of this road?

Ans. So far as I know, from parties who subscribed to the stock, Eastern capitalists.

Ques. Can you state who they are?

44 Objected to, and objection sustained.

Ques. Who pays the men at work and who paid those who had been at work heretofore upon the construction of this road?

Objected to as immaterial. Objection overruled.

Ans. The checks that have passed through our business house have been signed by A. A. Robinson, Chief Engineer of the Cañon City and San Juan Railroad.

Ques. Now, I will ask you if you know where

FOLIO

the funds he pays with, or draws on, come from?

Ans. Certainly, I do not.

Ques. When was the construction of this road

45 you call the Cañon City and San Juan Railroad commenced?

Ans. On the 19th of April. You mean construction, not survey nor preliminary work. The actual work was commenced on the 19th of April.

Ques. Who put those men to work on the 19th of April?

Ans. Well, Mr. Clelland gave orders to our clerks. I was absent for a few minutes at the time when the order came in to supply such

46 men as Mr. Morley might have with him and others who Mr. Clelland hired in the street, which we, at the time, charged to James Morley.

Ques. Who was Morley?

Ans. A man who had been previously in the employ of the Cañon City Company. In whose employ he had been, preceding the 19th of April, I don't know.

Ques. Who had charge of those men on the 19th of April, and set them to work, as engineer? Defendants' Counsel: We will admit that Morley did.

Ques. When had you seen Mr. Morley in Cañon, prior to the 19th of April. Objected to.

Ans. Well, I don't remember when I had seen

47 him before I saw him that day, it might have been months before.

Ques. Do you know where he came from that day?

Ans. I do not.

Ques. From whom did you get your first inti-

mation or information on the 19th of April, that your company was going to start, to begin the construction of its road? Objected to as immaterial. Objection overruled.

Ans. Mr. Clelland was the first man spoke to me in regard to it, the treasurer of the road.

Ques. Was Mr. Morely with him at the time?

48 Ans. No, sir.

Ques. Just come into town, had he not?

Ans. I don't know, I don't think that I saw him then. I saw Mr. Clelland before I saw Mr. Morley, they were not together.

Ques. Did you go with Morley that day anywhere?

Ans. I did not.

Ques. You may state from whence the large proportion of the men at work in that Cañon between the 19th and 25th of April came?

Ans. The teams were almost entirely Cañon teams, and such loose men as were about Cañon were all employed, every man that could be hired

49 was employed, got all such help as we could from the neighborhood, every man, I even spared clerks from my store to go to work, and they did work for days, the teams were Cañon teams.

Ques. I ask you from whence the majority of the men came who were at work in that Cañon between the 19th and 25th of April?

Ans. I should suppose the majority came from Puebloward, I don't know where from beyond that.

Ques. Under whose direction were they hired and brought up?

50 Ans. They were under the control of Mr. Robinson, our chief Engineer, I don't know

where he got them, they came into Cañon under his direction, were received by him.

Ques. Mr. Robinson was your chief engineer from and after the 19th of April, was he?

Ans. Yes, sir.

Ques. But never before was he?

Ans. No, sir. He was elected on that day.

Ques. What position did Morley hold in the company before the 19th day of April?

Ans. Well, he had been on the survey, I think, in a subordinate position, as engineer.

Ques. Hired by whom; Holbrook, or the Company?

51 Ans. Well, I can't tell you, I don't know what the arrangement was.

Ques. I will ask you directly if the first information which you, or any of your Company had that the construction of this road, which you call the Cañon City and San Juan Railroad, was to be begun on the 19th day of April, did not come directly from Morley, who came up from the employment of the Atchison and Topeka Railway Company. (Objected to. Objection overruled.)

52 Ans. Mr. Morley didn't speak to me about it at any time. I got my whole information from Mr. Clelland, that we would commence work that day.

Ques. How long before the 19th day of April last did you as one of the directors of the company know that the work on that road was to be begun on that day, or in any fixed time? Objected to as immaterial. Objection overruled.

Ans. I don't think the time, so far as my knowledge is, had been fixed, it was expected to

53 be begun very soon. I don't think it had been

FOLIO

fixed definitely, it had not so far as my knowledge was concerned.

Ques. What company was expected to begin very soon the construction of that road, your company or the Atchison, Topeka and Santa Fé Company?

Ans. Our own company through its own officers as it has done it.

Ques. Do you know whose teams they were, if any, that those railroad hands, the majority of them, were transported to Cañon in and by? Objected to as immaterial. Objection sustained.

54 Ques. What agency direct or indirect did your company have in bringing the men from a distance and putting them at work in the Grand Cañon on your railroad?

Ans. Mr. Robinson, so far as I knew in regard to bringing these men in there, had employed all the teams he could get in Cañon, and some of them were transient Pueblo teams. I don't know of any company teams at all.

Question repeated.

Ans. Well, my answer must be as heretofore, that Robinson hired all the agencies in the way of horseflesh to bring the men in.

Ques. Mr. Robinson was not your agent or
55 Chief Engineer before the 19th, was he?

Ans. Not before the 19th.

Ques. How many men came up there the night of the 19th and morning of the 20th from abroad?

Ans. I have not an idea, there was a crowd, there was a great many.

Ques. You know there was a good many? Mr. Robinson hired them, didn't he?

FOLIO

Ans. I don't know, sir. I don't know whether through Robinson agency or not. I suppose it was his agency, but I don't know of my own knowledge.

56 Ques. How many men did Clelland succeed in getting to work in the Grand Cañon on the 19th of April, or anywhere on your road?

Ans. I cannot give it definitely. I could not swear to the definite amount. Three or four loads went up, from six to ten in a load that I saw. Whether others went, I do not know.

Ques. Did you see those hand-bills stuck up around Cañon City, advertising for men to work on this railroad?

Ans. I think I did since it was called up here,

57 I had forgotten anything of the kind.

Ques. If Mr. Robinson was Chief Engineer of your road then, and your company was building that road at that time, and the Atchison, Topeka Company were not, how do you account for that hand-bill. Objected to, and objection sustained.

Ques. You saw that hand-bill?

Ans. I think I did.

Ques. Did you or any of your company object to the language of that hand-bill at that time? Objected to, and objection sustained.

Ques. When did you hold your last meeting of the board of directors of your company?

58 Ans. I think the last meeting, I am not certain whether it was the last meeting, for I had been absent a portion of the time. I think that the last meeting I attended was on the 19th of April, but I would not say that was the last meeting of the company, because I have been in St. Louis and away from home a portion of the time.

FOLIO

Ques. What control or supervision, if any, has your company over the construction of that road in the cañon so far as you know?

Ans. I think it has full control through its
59 officers.

Ques. How many and what reports have been made by the Chief Engineer or the Superintendent of Construction to your company since the commencement of work on that road? Objected to. Objection overruled.

Ans. I can't tell you, I don't know.

Ques. What has been the cost or the approximate cost of your work up to this time?

Ans. My other answer would cover that, if there had been no reports. I would have no judgment in the matter, I have not looked it over. I don't know.

60 Ques. What arrangement, if any, has your company made with the Atchison and Topeka Railway Company for the furnishing of money to your company to construct that road with?

Ans. None that I know of whatever.

Ques. Then, so far as you know, there has been no arrangement made between your Company and the Atchison and Topeka Company by which the Atchison and Topeka Company would furnish your Company money to be paid for such
61 money by traffic arrangements and railroad connections with your road?

Ans. Nothing.

Ques. When this road is constructed and completed, if at all, it belongs to your Company, does it? Objected to as leading. Objection sustained.

Ques. What was the greatest number of men, at any time, engaged in the work of construction

FOLIO

of the road you call the Cañon City and San Juan Railroad?

Ans. That would be impossible for me to tell; a crowd of both companies, so many of both there, difficult to tell D. & R. G. Company; I only met them in town, going out to the road,
62 having business of my own to attend to just then. I have no idea of the force in either camp.

Ques. With whose funds have the expenses of the constructing of the road so far been paid? Objected to. Objection sustained.

Ques. Were you present at the meeting on the 10th of April when the directors were elected last—Mr. William P. Strong was elected at that time a director?

Ans. He was.

Ques. What position, if any, at that time did
63 he hold in the Atchison, Topeka and Santa Fé Road? Objected to as immaterial. Objection overruled.

Ans. I only know by rumor that he was connected with the Atchison and Topeka Road. I know nothing of it by my personal knowledge.

Ques. At the time that your survey was made through the Grand Cañon did you, as one of the directors, know that the D. and R. G. Company had run a line through that cañon and had done some work in the cañon?

Ans. I did not.

Ques. Did you know that they had run a line through there?

Ans. I did not.

Ques. Did you, after the survey was made
64 and the report of your engineer made to your company?

Ans. I never knew until very recently that

the D. and R. G had ever passed through the cañon, or had any claim on it, until this suit commenced.

Ques. As one of the directors of this company you, at no time until the commencement of this suit, were aware that the D and R. G. Company claimed a right of way in that cañon?

Ans. I was not.

FREDERICK A. RAYNOLDS, SWORN.

Ques. Where do you reside?

Ans. At Cañon City, Fremont County.

Ques. What position, if any, do you hold in the Cañon City & San Juan Railway Company?

65 Ans. I am president of the company.

Ques. How long have you been president?

Ans. About a year, now.

Ques. During your presidency, or your connection with the company as an officer at any time, what do you know, if anything, about any contract or arrangement having been made with any individual or company for the furnishing of money for the construction of your railway from Cañon City through the Big Cañon of the Arkansas?

Ans. There was no arrangement made with any one.

66 Ques. How many shares of stock do you own?

Ans. One share.

Ques. How much did you pay for that, if anything?

Ans. I paid one hundred dollars for it.

Ques. In money?

Ans. The same as money to me. I had a transaction with Mr Rockafellow; we had a trade on that building in our settlement.

Ques. Mr. Rockafellow sold you that share of

stock as his private property, did he, or as secretary of the company?

Ans. It was private property, I presume.

Ques. Has the company ever had a survey made of that cañon?

Ans. Yes, sir.

Ques. When was that made?

67 Ans. About February or March, 1877, they started in up there.

Ques. Who was your engineer?

Ans. Mr. Holbrook.

Ques. Can you now remember the cost or approximate it of the expenses of that survey? Objected to as immaterial. Objection overruled.

Ans. Well, that survey and the survey west, over Poncha Pass and Comanche Pass, altogether cost to exceed twelve thousand dollars.

Ques. Who paid for that, your company?

Ans. Yes, sir.

Ques. How did they pay for it?

Ans. They paid for it in money.

Ques. To whom did they make the payment?

Ans. To Mr. Holbrook principally. He disbursed it.

68 Ques. From whom, if any person, did the company get the money, the twelve thousand dollars? Objected to as immaterial. Objection sustained.

Ques. How much stock of your company, if any, was issued to pay for the costs of this survey?

Ans. The amount required, twelve thousand dollars, I presume, about that amount.

Ques. Was that stock issued at its par value? Objected to.

69 Ques. At what price on the dollar was this twelve thousand dollars of stock issued? Objected to, and objection sustained.

FOLIO

Ques. How many shares of stock did it take to pay twelve thousand dollars for the survey? Objected to.

Ans. I could not say.

Ques. You don't know how many shares it took to make twelve thousand dollars?

Ans. No, I wasn't president at that time. If I was, I could tell by signing the stock; that was before I came in as president. I was director at that time and paid very little attention to it.

Ques. Do you know how much of your stock
70 still remains undisposed of? Objected that there is no allegation in regard to the amount of stock in the bill. Objection sustained.

Ques. What has been the cost of the construction of this road, up to this time, since the 19th of April?

Ans. Well, I should think in the neighborhood of eighty thousand dollars; eighty or ninety thousand dollars.

Ques. Who has paid that money out?

Ans. The Cañon City and San Juan Railroad Company.

Ques. Through whom?

70 Ans. Well, they issued time checks, or vouchers were drawn on—as I was doing a banking business there I presume made payable by me—drawn on me as president.

Ques. Where did you get funds by which you paid them?

Ans. From Mr. Robinson. The funds came up there in currency, addressed to him.

Ques. Do you know from what source he got it?

Ans. I do not; he turned the currency over to me; I paid it.

Ques. Is the Cañon City & San Juan company

FOLIO

furnishing the money, directly or indirectly, which
71 goes to pay for the construction of this road?

Will you please explain now, where they got the money from and how they get it? (Objected to. Objection overruled.)

Ans. Well, I don't know exactly, where they get it from. I never investigated that very thoroughly. It was no concern of mine.

Ques. How many directors have you?

Ans. We have seven or nine, I ain't certain which—I think it is seven, (seven or nine). I think I can name them.

72 Ques. Mr. Robinson furnished you with the money you paid out, you don't know where he gets it from?

Ans. No, I never investigated that.

Ques. When did you begin the construction of this road?

Ans. I think in February or May, '77; we have been working off and on.

Ques. You say that the money came to Cañon to Mr. Robinson, came up from where?

Ans. I could not say as to that, I presume from Pueblo, though it may have come from further east. It came up there dead head express, I don't remember where it came from. If he wasn't there he gave me an order to get it, to
73 go to the express office and get it. It was simply addressed to A. A. Robinson, as currency.

Ques. Were you present at the meeting at which directors were elected in April last?

Ans. Yes sir.

Ques. What preparation or corporate action was then taken, if any, for the commencement of the construction of this Cañon City and San Juan Road?

FOLIO

Ans. We had our annual meeting at that time. The stockholders elected directors. Directors elected officers. After that there was some talk about going ahead. Mr. Thatcher was
74 there, he is a director. He informed us they were going to commence very shortly.

Ques. Will you tell us who they were?

Ans. Well, the Company. He represented the stockholders.

Ques. Which company do you mean?

Ans. The Cañon City & San Juan. He represented the bulk of the stockholders.

Ques. Do you know who the bulk of the stockholders he represented were or are? Objected to, and objection sustained.

Ques. How long before the 19th of April did you know certainly that your company was going to engage in the construction of that road?

Ans. Well, I was pretty well convinced of it
75 from what conversation I had with Mr. Thatcher about the 10th. I had had a private conversation with him that convinced me they were going ahead to build.

Ques. That your company was?

Ans. Yes, sir.

Ques. You were president and he was simply a director?

Ans. Yes, sir.

Ques. Do you know how much stock he represented in representing these stockholders?

Ans. In the neighborhood of sixty or seventy thousand dollars.

Ques. Did you know William R. Morley?

Ans. Yes, sir.

Ques. When did you first see him?

76 Ans. He was there at Cañon last summer,

FOLIO

about a year ago on his road west then with Mr. Holbrook.

Ques. When did you next see him after that and before the 19th of April, if at all?

Ans. I don't think I saw him.

Ques. You state from whom you got your information on the 19th of April, that your company was then going to begin the construction of the road on that day?

Ans. I was at Pueblo that day and met Mr. Thatcher there and talked with him about it. I went down that morning on the train and got the
77 word in Pueblo, that they were going to commence immediately. I was pretty well aware as I said before, about the 10th.

Ques. Where did most of the men who have worked for the Cañon City and San Juan Company come from?

Ans. I think Mr. Thatcher hired them in Pueblo. He had some posters up there to which he signed my name. He asked me if it was all right to sign my name to posters, I told him all right.

Ques. For whom were the majority who afterwards went into that cañon to work for the Cañon City and San Juan Company employed im-
78 mediately before they went to work for the Cañon City Company? Objected to.

Ans. I think they were tramps mostly, picked them up, that is my idea.

Ques. What connection, if any, had Thomas Nickerson, the president of the Atchison, Topeka and Santa Fé Company with your company?

Ans. None whatever.

Ques. What right, if any, so far as you know,
79 had he to make an arrangement, with the D. and

FOLIO

R. G. Railway Company as to the construction of your route through the Cañon?

Ans. He had no right.

Ques. When did Mr. Robinson become connected with your company as engineer?

Ans. He was elected the evening of the 19th of April He was elected chief engineer, and Mr. Strong, general manager of our road.

Ques. What position does Mr. Strong hold in the Atchison and Topeka road?

Ans. I understand he holds the position of Vice-President of the Atchison and Topeka road.

80 Ques. Who has paid the expenses of this litigation up to this time, your company or some other?

Ans. Our company, I presume.

Ques. Through whom have they paid it. Objected to. Objection sustained.

Ques. You say Mr. Thatcher put out a handbill and signed your name to it on the 19th of April at Pueblo, calling for men to work on this road?

Ans. Yes, sir. Cañon City and San Juan Railroad.

Ques. What authority had been given to him by the board of directors of your company. Objected to. Objection overruled.

81 Ans. I presume no authority, that was his idea in asking me, I presume. He just wanted to know whether it would be right. I told him, certainly, I did not see any objections to that. We wanted men. I knew they had engaged all they could in Cañon at that time.

Ques. Under whose control did the first shipment of men come up?

Ans. I think under his control.

FOLIO

Ques. When did Robinson come up?

Ans. He came up the evening of the 19th.

Ques. What time in the evening was he appointed the Chief Engineer of your road?

82 Ans. About eight o'clock.

Ques. What charge and control was he taking of the men in the cañon, in placing them, before he was appointed, if you know?

Ans. I don't think took any part at all, in fact, I know he did not.

Ques. You know that he did not go up to that place about five o'clock and take his men with him, and place them in the cañon?

Ans. No, I am not aware that he did. We came in on the train together, and we had a conversation and appointed a meeting, went about

83 our supper, and I don't know where he went.

Ques. What connection had Morley with your company at any time?

Ans. I suppose you could call him Assistant Engineer under Holbrook.

Ques. You had no contract with Morley?

Ans. No, sir. We made our contract with Mr. Holbrook.

Ques. What arrangement has your company made with the Atchison and Topeka Company, if any, by which the Atchison and Topeka Company is to furnish the money to your company for the expenses of the construction of this road, and by which arrangement the Atchison and Topeka

84 Company are to receive payment by a traffic arrangement and connection of their road with yours. Objected to.

Ans. There has been no such arrangement that I know anything about, and I have attended

all the meetings, and I am pretty certain that there has been no such arrangement made.

Ques. What control does your company exercise over the construction of that road as it has heretofore proceeded and is now proceeding. Objected to. Objection overruled.

85 Ans. I think we have full control.

Ques. I will ask you if you have ever yet as a company exercised any?

Ans. Well, no. We have a good deal of faith in Mr. Robinson, and are willing to let him go ahead.

Ques. What contracts, if any, have your company made with contractors for building that road?

Ans. I believe our Chief Engineer has advertised for bids and received them.

Ques. I asked you what *contracts* have you made, if any?

Ans. I suppose the General Manager and Chief Engineer would make those contracts. I don't know that they would bring it before us.

Ques. Has the Chief Engineer ever consulted
86 with the Board of Directors in regard to those contracts, or laid them before the Board?

Ans. No.

Ques. Has the Board ever taken any action as to any bids which have been sent in?

Ans. Not as yet.

Ques. Have bids been sent in up to this time?

Ans. I think they have.

Ques. Do you know the name of any of those who have made bids?

Ans. I do not.

Ques. The Board then has taken no action

FOLIO

in relation to this matter at all, but left it with the Chief Engineer?

Ans. And the General Manager.

Ques. Mr. Strong?

Ans. Yes, sir.

B. F. ROCKAFELLOW, SWORN.

Ques. Where do you reside?

Ans. Cañon City.

Ques. What position do you hold in the Cañon City and San Juan Railway Company?

87 Ans. Secretary.

Ques. How long have you held that position?

Ans. Since the organization of the company, our first meeting after the articles of incorporation were filed.

Ques. I will ask you to state what contract, if any, has ever been made by your company with the Atchison, Topeka Company by which the Atchison and Topeka Company is to furnish your company money necessary to construct your road from Cañon City to—I don't know where, at all events to construct your road, and for which the Atchison, Topeka and Santa Fé Company is to be

88 paid by traffic arrangements and connections with your road, or in any other way?

Ans. There is no contract made with the Atchison, Topeka Company as a company to furnish us money.

Ques. I will ask you from what source you raise the money by which you are constructing the road, if you are constructing it. Objected to. Objection overruled

Ans. From the subscriptions to the capital stock of the company.

Ques. Will you state as secretary, how much

FOLIO

the capital stock of the company is at this time?

Ans. One hundred thousand dollars.

Ques. How much of that stock is out?

89 Ans. It is all subscribed for.

Ques. It has been issued?

Ans. It is considered to be all paid for and expended, but the vouchers have not all been entered up.

Ques. How much money has the company realized from the sale of its stock?

Ans. It has been credited for the full amount, that is, will be, when the—— I can't tell the exact amount at the present date, the matter has been in the hands of the general manager and superintendent since April 19th

Ques. Can you tell from consulting books?

Ans. I can tell what amount is entered up to the time the general manager was appointed.

90 Ques. I want to know how much money in dollars and cents the company has ever realized up to this time from the sale of its stock. I don't care if you don't come within a thousand dollars of it, two thousand?

Ans. The amount of the credit on the stock up to the present time, that has been entered, I understand to be between twenty-five and twenty-six thousand dollars.

Ques. In money.

Ans. It is considered to be in money to the company.

Ques. Has the company ever issued any bonds?

Ans. No, sir.

Ques. They have realized about twenty-five or twenty-six thousand dollars from the sale of their stock?

FOLIO

91 Ans. I say there is that amount entered up on their books; the balance has been expended, but not entered up, as I understand.

Ques. Tell me how much money has been expended by the company on its stock?

Ans. I understand nearly the full amount expended, if not all.

Ques. How much money has been expended to pay for surveys?

Ans. Twenty-four thousand dollars, the entire surveys west. There was twenty-four thousand of the one hundred dollars shares of stock issued in payment of all the surveys that have been made.

Ques. For what other service was any other portion of the stock issued beside the survey?

92 Ans. For room rent, lights and salaries of officers.

Ques. What officers?

Ans. Treasurer and Secretary, and for legal services.

Ques. How much stock do you hold as Secretary?

Ans. One share.

Ques. How much does the Treasurer hold?

Ans. One share.

Ques. How much has been issued to the attorneys?

Ans. Well, three shares to Mr. Gast as attorney. He holds three shares as attorney; he holds three other shares by subscription subsequently.

Ques. Now, by the subscription subsequently, how much money was realized?

Ans. We understand that all the money has

been realized and expended, but, as I said before, all the vouchers have not been entered up.

93 Ques. How much money, actual dollars and cents, has ever been received by your company for the sale of your stock?

Ans. As I said before, the cash has actually been expended for work in the Grand Cañon, but the vouchers not entered up, all except what was paid for se—— by the directors under our laws.

Ques. Who owns this stock?

Ans. Mr. Isaac T. Burr holds two hundred and eight shares; Aldon Speers, 208 shares; W. B. O. Peabody, 209 shares. I can tell you the larger amounts: Mr. Gast 87 shares, or 90; Mr.

94 M. D. Thatcher, 90 shares; William B. Strong, 90 shares; A. A. Robinson, three shares; Thomas Nickerson, 90 shares, and several smaller shares.

Ques. And is it from the sale of those shares you are raising the money that is building this road?

Ans. It is payment on those subscriptions to the shares of stock that is building the road.

Ques. You expended about twenty-four thousand dollars in stock for the survey?

Ans. Twenty-four thousand, one hundred dollars stock was expended for the entire surveys, including the surveys west that we considered in the interest of our company.

95 Ques. And had about seventy-six thousand dollars left in stock, and it is from the proceeds of this stock you are building this road through the cañon?

The Court: You say there are a thousand shares in the company?

FOLIO

Ans. There are 625 shares subscribed for before the later amounts.

Ques. The proceeds then of 76,000 dollars—shares—or say 760 shares, the proceeds of those seven hundred and sixty shares, are the only means the company has to build this road on, ain't it?

Ans. So far as yet raised, that and what has been paid for incidentals.

Ques. Who is controling the construction of this road in the cañon?

96 Ans. The share holders, through the General Manager and Chief Engineer, directly control it.

Ques. Have any contracts been let yet?

Ans. I understand from the chief engineer that contracts have been advertised and bids received, and contracts let, or about to be let.

Ques. You have never seen them, as secretary?

Ans. They were entirely in his control—until some annual meeting they are entirely in his control as chief engineer.

Ques. Is there anything in your resolutions appointing Robinson giving him this unlimited power, or the unlimited power you speak of giving to the general manager?

97 Ans. He was also appointed general superintendent—superintendent of construction—William B. Strong.

Ques. You have resolutions to that effect?

Ans. Yes, sir, on our records. He is manager of construction, general manager and superintendent of construction.

Ques. Have you as yet seen any propositions which have been advertised, or any proposals advertised, except what you saw in the paper, or have they ever been laid before you as a board?

Ans. We have had no board meetings since that.

Ques. Everything is left to the general manager, Mr. Strong?

Ans. And the chief engineer.

98 Ques. You assisted in the organization of the company, did you not, originally?

Ans. I did.

Ques. Did you at that time, as one of the officers of the company, expect that this company, the Cañon City & San Juan company, would build that road, or did you expect and intend, in forming this organization, to hold that cañon for the Atchison-Topeka company?

Ans. We expected to get the road built through our organization—that was the object in organizing it—was to get another railroad.

Ques. You mean that you expected to let some
99 other company use your name and build this road? Objected to.

Ans. Expected to do just as I answered.

Ques. What was your expectation, or what was the expectation of the Cañon City & San Juan company, at the time of the organization, and up to the 19th day of April last, as to the Atchison-Topeka company building its road through that cañon and holding it, and owning it as its own road? Objected to. Overruled.

Ans. We had no expectation that the Atchison-Topeka company was going to build the road at all. We expected to raise money and have the road built through this organization—the Cañon City & San Juan Railroad—money raised from its stockholders.

100 Ques. Since the 19th of April last, and up to this time, is it not true that the movements and

FOLIO

operations of your company have been controlled entirely by Mr. Nickerson, the president of the Atchison-Topeka company?

Ans. I can only answer that, by telling that the shareholders of the Company are east, and we consider that directly through their influence the operations of the Company have been conducted, that is through their influence seconded by the appointments we have made of superintendent of construction and chief engineer.

101 Ques. What do you know at this time of the Atchison Topeka Company, as a Company raising money for the building of this road through the Grand Cañon?

Ans. If they are raising it, it is credited on the subscriptions to the stock of our Company, and we know nothing directly of their action; we only know that our shareholders are furnishing the money. Handed paper "B."

Ques. Do you know anything about that circular?

Ans. That is the first time I ever saw it, sir.

Ques. Mr. Peabody figures in that? No answer.

Ques. Have you any knowledge of the Atchi-
102 son, Topeka and Santa Fe Railway Company, or the Pueblo and Arkansas Valley Company raising money at this time to build a road through this cañon as its road?

Ans. Only by rumors; no sir, no knowledge of it, except that there is a Pueblo and Arkansas Valley road, and Atchison, Topeka and Santa Fe road, that are raising money.

Ques. Now I will ask you what arrangements if any, you have with these men, Peabody, Speer and the others who you have mentioned as hold-

ing large quantities of this stock for raising and paying more money in the construction of this railroad than their stock amounts to? Objected to. Objection overruled.

103 Ans. We have no arrangement closed.

Ques. What mortgage, if any, have you executed upon your road to secure the persons who advance this money?

Ans. Not any. The road has been built so far entirely on subscriptions to stock.

Ques. Do you know what the cost of it has been up to this time?

Ans. I understand nearly the amount of the capital stock has been expended, and vouchers have been issued up this time. I had it from the chief engineer who was managing it.

Ques. Is the work still progressing in the Cañon?

104 Ans. Some work being done there.

Ques. Have you any idea at this time about what the expenses amount to a day?

Ans. I have not.

Ques. And still you have no arrangement for any more money?

Ans. No arrangement closed.

Ques. Have you any in progress?

Ans. We have an anticipation of an arrangement with the Pueblo and Arkansas Valley Railroad?

Ques. They are to get the money as provided in this circular?

Ans. I don't know where they are to get the money.

Ques. Do you know at this time the Company has raised the money to go on and build the road?

FOLIO

105 Ans. I am told they have I am told by Col. Strong that the money is raised to build clear through.

JAMES CLELLAND, SWORN.

Ques. Where do you live?

Ans. In Cañon City.

Ques. What position do you hold in the Cañon City and San Juan Railway Company?

Ans Treasurer.

Ques How long have you held that position?

Ans. Since the organization of the company, in fact, since the first meeting after the articles of incorporation were filed.

Ques. What is your company now doing towards building a road through the Grand Cañon?

Ans. We are still building every day.

Ques. When did you begin?

Ans. We commenced in the first place the
106 surveys in February, 1877; commenced to construct the road on the 19th day of April, I believe.

Ques. About what time in the day did you begin?

Ans. About ten o'clock.

Ques When did you get the first information that your company was ready to build a road?

Ans. On the tenth of April there was a conversation regarding it, but no definite day fixed at that time when we would commence.

Ques. When did you first get information on the 19th that you were to commence on the 19th?

Ans. About eight o'clock in the morning.

Ques. From whom?

107 Ans. Mr. Morley was my informant at that time that we wanted to commence that day.

Ques. What connection did Mr Morley have

at that time with the company, and what position did he hold?

Ans. He had been employed as engineer of the company previous to that, he had been employed by the Cañon City and San Juan Railway company.

Ques. When.

Ans. I don't recollect exactly as to the time.

Ques. Was he employed at a corporate meeting?

Ans. He was employed under Holbrook, I should think.

Ques. You mean Holbrook employed him, not the company?

108 Ans. Mr. Holbrook had power to employ what employes he wanted.

Ques. Had you had any sort of connection or business relations with him for a year preceeding the 19th of April; had you seen him?

Ans. I hadn't seen him for at least six months previous to that day.

Ques. At that time was he in any employment in the Cañon City and San Juan Railway Company?

Ans. I don't know that he was

Ques. You got your information from a stranger?

Ans. He brought me the information, yes, sir, not from a stranger though.

Ques. At eight o'clock in the morning?

Ans. Yes, I think it was about that time; it was early.

109 Ques. Now then, do you know where Mr. Morley got his information?

Ans. I think Mr. Thatcher informed him

what to do. He was one of the directors at that time—M. D. Thatcher.

Ques. One director informed a stranger that he was to build a road?

Ans. I don't know exactly what he informed him, I have told you just about the correct way of it.

Ques. Now in whose employment, if you know, was Morley at the time he came to Cañon City on the 19th of April.

Ans. I don't know any further than that, I know he had conversation with Thatcher, at least
110 he informed me so, that is all I know about it.

Ques. Who had charge as engineer of the force you put to work that day, if any one did?

Ans. We had no engineer there unless we called him engineer at that time.

Ques. What had he to do with the company?

Ans. On that day I sent him up to the twelve mile bridge to set a gang of men at work there myself.

Ques. Did the company at that time appoint him to any position in the company?

Ans. No, sir.

Ques. Ain't it the truth that you accepted him as one of the engineers of the Atchison, Topeka & Santa Fé company?

111 Ans. I don't know that I gave it any thought at all as regards the Atchison, Topeka & Santa Fé company.

Ques. What word, if any, did he bring from the Atchison, Topeka & Santa Fé company about taking charge of that cañon?

Ans. He didn't bring me any word.

Ques. What information did he give you as to the desires of the Atchison, Topeka & Santa Fé

company, that you should proceed and take charge of that cañon?

Ans. I don't recollect that he gave me any.

Ques. In what capacity did he pretend to act

112 when he came up there and informed you at eight o'clock? Objected to.

The Court. It is competent to ask what he did; what he pretended to is very indefinite; what he said ———.

Ques. Will you state where Morley said he came from?

Ans. He came from Pueblo, as I understood him, that is last.

Ques. How did he come, on the regular train?

Ans. No, sir; it was a little dangerous to travel on the regular train, they might stop it; he came horseback.

113 Ques. What did he tell you about the place he had ridden from since he had started to come to Cañon?

Ans. I don't think he told me anything—that he rode from any place except Pueblo.

Ques. Didn't tell you about Rock Bridge, Rocky Cañon, or Rocky Ford?

Ans. I don't recollect anything at that time; I did hear afterwards, but not at that time.

Ques. What information, if any did he give you about other parties preparing to take possession of the Cañon at that time? Objected to. Objection sustained.

Ques. How many men did you put to work on that day under the control of Mr. Morley?

114 Ans. I had something over thirty men; between thirty and forty men in the two places between the mouth of the cañon and the twelve mile, as near as I can recollect.

Ques. When did the next reinforcement of men come up?

Ans. There was a few came up on Saturday, towards evening.

Ques. What day of the month was that?

Ans. The 20th.

Ques. Did any of them come on the night of the 19th, or the morning of the 20th?

Ans. I am not positive as to that; I don't recol-
115 lect as to that; the main part of them came on Sunday.

Ques. About how many men came up between the 19th and 25th of April?

Ans. Well, sir, I could not tell exactly how many came. We had over four hundred in the Grand Cañon, according to the time list—they were all numbered—there was over four hundred.

Ques Where did the majority of those men come from, around Cañon or some distant point?

Ans. I could not say where they came from—they came in teams. I furnished fresh teams and sent them up Saturday.

116 Ques. Prior to the 19th of April, what arrangements had your company made for the construction of your road?

Ans. The only arrangement that was made prior to the 19th was made on the 10th. Conversation regarding how soon we were to commence operations, and the understanding at that meeting was we would commence very soon.

Ques. On the 10th, when you made these arrangements of which you speak, what amount of funds had you to commence with? Objected to, and objection sustained.

117 Ques. At that time, or at any time since, up to this time, what arrangement, if any, had you, or

have you with any person or company by which you are to raise the means for the construction of that road?

Ans. There are no arrangements except as regards those who have subscribed for the stock. Stock has been subscribed for.

Ques. How many shares of stock do you hold?

Ans. I own one share to-day.

Ques. How much money did you pay for it?

Ans. I did not pay any money for it. I received three shares from the company for my
118 services as treasurer, and other duties which I performed for them.

Ques. How many shares does Mr. Thatcher hold?

Ans. I believe he owns ninety shares, sir (referring to memorandum.)

Ques. How many does Mr. Rockafellow hold?

Ans. One, I believe.

Ques. How many does Raynolds? Objected to. Objection sustained.

Ques. Can you tell how many shares of stock you have had to dispose of upon which to get money?

Ans. I think the stock is all issued at the present time.

119 Ques. How many shares were issued for services already rendered, and to be rendered?

Ans. In the first year of the organization of the company there was twenty-five thousand dollars in all issued in stock—twenty-four thousand and some odd for surveys, and the balance for rent of rooms and other labors, stationery, etc. made twenty-five thousand in all.

FOLIO

Ques. How long has all the stock been out?

Ans. It is only a short time since it was first subscribed.

120 Ques. Have you ever made a call upon the stockholders for payments on this stock?

Ans. They always paid without a call—very prompt.

Ques. Do you know what the cost of construction has been up to this time?

Ans. I don't, sir. The bills have never been acted upon.

Ques. Have they ever been presented to the Board?

Ans. They have not had any meeting since that time, so that they could act.

Ques. You don't know what the expenses of the company, from its organization down to this time, have been, including all expenses incident to the company?

Ans. I do not.

121 Ques. What control has your company over this construction?

Ans. The directors have the full control over it up to the present time.

Ques. How much have you exercised up to this time, any? Objected to, and objection sustained.

Ques. When was Mr. Robinson appointed Chief Engineer of your road?

Ans. On the night of the 19th of April, in the evening, I think it was.

Ques. What business had he controlling the hands and placing them in the cañon before he was appointed Engineer of your road, do you

122 know? Objected to.

Ques. What right had he to control your

FOLIO

hands before he was appointed Chief Engineer? Objected to.

The Court. If you ask about rights, it will be excluded; what we want is what was done. We will judge about rights without taking the opinion of any one.

Ques. What time did Mr. Robinson arrive in the cañon?

Ans. I could not say, sir. I was busy, that is the truth about it. I don't recollect about what time he did arrive.

Ques. What did he do in the cañon towards controlling their men before he was elected Chief

123 Engineer?

Ans. I don't know that he did anything.

Ques. Don't you now know that he was in the cañon that afternoon before he was appointed Chief Engineer?

Ans. I don't think he could be there at all, that is my impression.

Ques. Do you know at this time upon what business Mr. Robinson, Chief Engineer of your road and then Chief Engineer of the Atchison, Topeka and Santa Fé Road, had in the cañon?

Ans. I don't know whether I met him; am not certain whether I saw him on the 19th.

124 Ques. Was he present when you appointed him Chief Engineer?

Ans. I am not certain as to that sir.

Ques. You don't know that he was there on that day at all?

Ans. I am not positive as I told you. I was busy, had very little time to dispose of?

Ques. Do you know who hired those four or five hundred men who came up from below in

wagons and went to work on your road, as you call it?

125 Ans. My understanding was that Mr. Thatcher was the principal hand that was hiring in Pueblo.

Ques. Where do you understand Mr. Thatcher did employ them?

Ans. I don't know.

Ques. What, if anything, do you know of those men coming from the work of the Atchison Topeka and Santa Fe Company, from La Junta towards Trinidad?

Ans. I don't know anything about that.

Ques. What, if anything, do you know of a large portion of them coming all the way from Kansas City?

Ans. I don't know anything about that.

Ques. What authority, special or otherwise, or
126 general, did Thatcher have from your board of directors, to hire men at this time, or at any particular time?

Ans. He was one of the directors in the Company, and in the conversation on the 10th, it was pretty well understood that we would commence there very soon, but no definite day.

Ques. Was he then and there empowered to pick up men wherever he could find them, and send them up?

Ans. If the case required it. I expect he was.

Ques. The first intimation that you had on the 19th that your Company was a going to build
127 a railroad, on that day, was from Morley?

Ans. Yes sir.

Ques. A man who had no authority on the road?

Ques. Did you ever see that; handed hand bill?

Ans. Yes, I have seen some bills similar to this?

Ques. Well, now, were they put out before or after the 19th of April?

Ans. They were printed to the best of my knowledge after the 19th, sir. And the reason if you want it, these bills were printed: The Den-

128 ver and Rio Grande officials, through their men, circulated there, that our Company was nothing but a bogus concern, and it was going to have an effect upon our employing men, and it was talked over with Mr. Robinson and he agreed to sign it as agent of their Company, so we could get more men to work, a little faster.

Ques. I will ask you in relation to that, if you hadn't four hundred men in the Cañon when this was published?

Ans. No sir, that was published on Saturday.

Ques. Was this intended to have effect at Cañon or below, where was this circulated?

129 Ans. It was circulated in Cañon City.

Ques. What proportion of all men ever at work on your road, were men living in and about Cañon City?

Ans. I could not tell the exact number.

Ques. I ask you about what proportion?

Ans. I should judge between forty and fifty men.

Ques. Out of six or seven hundred men, and it was to hold these Cañon City men that this was done? No answer.

CROSS-EXAMINATION OF JAMES CLELLAND.

Ques. Was Mr. M. D. Thatcher, of Pueblo, present at the meeting on the 10th of April?

Ans. Yes sir.

FOLIO

Ques. State what quantity of stock he rep-
130 resented by proxies, if any?

Ans. He represented something like six hundred shares of the stock by the proxies from the owners.

H. R. HOLBROOK, SWORN.

Ques. What position, if any, do you hold in the Cañon City and San Juan Railway Company?

Ans. I have no position now.

Ques. Have you ever had any?

Ans. Yes, sir.

Ques What was that position, when you held one?

Ans. As chief engineer.

Ques What services, if any, did you perform as chief engineer for that company?

Ans. I ran their line through the Grand Cañon.

Ques. Who employed you to do that?

Ans. The Cañon City and San Juan Railway.

131 Ques. What agency, if any, had the Atchison & Topeka Company in that employing you?

Ans. They had no agency.

Ques. To whom did you look for your pay for your work?

Ans. There was a contract made with me by the San Juan Company that I was to make the survey for so much stock.

Ques. How much?

Ans. Ten thousand dollars.

Ques. That is the only remuneration you got for it?

Ans. That was the remuneration—this stock was to be credited on my subscriptions or I could credit it to subscriptions of others.

132 Ques. That was a hundred shares, I believe?

Ans. Ten thousand dollars, yes, sir.

Ques. Now, Mr. Holbrook, you had no other pay but that for that business?

Ans. That was considered my pay; I credited it to the subscriptions of some others and received some money for it.

Ques. For what?

Ans. For crediting the stock.

Ques. You don't hold the stock now, do you? Objected to. Objection sustained.

Ques. I will ask you if you were not in the employment of the Atchison, Topeka and Santa Fé Company at the same time you made this survey?

Ans. No, sir.

133 Ques. Did you ever receive any payment from them for this business from the Atchison-Topeka Company?

Ans. No, sir.

Ques. From any other company?

Ans. No, sir.

Ques. What position at that time did Mr. Morley hold in the company, if any, in the Cañon City and San Juan?

Ans. No position that am aware of.

Ques. Did he assist you in making that survey?

Ans. Through the cañon, no, sir.

Ques. He never had any connection with you as the engineer of the Cañon City and San Juan Co., did he?

134 Ans. He made some surveys west the following summer, but he had no connection with me on the survey through the cañon on the first twenty miles.

Ques. When did you abandon your position

as engineer in the Cañon City and San Juan Company?

Ans. When there was another one elected; I suppose that was when.

Ques. Do you know?

Ans. I don't know; some time in April, I think.

Ques. Before this election, which supplanted you, you were in the employ of some other company, were you not? Objected to, immaterial; sustained.

135 Ques. Were you employed on the 19th day of April by the Atchison, Topeka Company, or the Pueblo and Arkansas Valley Company?

Ans. Well, I have been doing some work for the Pueblo and Arkansas Valley.

Ques. On the 19th of April were you in the cañon?

Ans. Yes, sir.

Ques. Was Mr Robinson there?

Ans. Yes, sir.

Ques. What day did he come up to the Cañon?

Ans. Went up on the train; I don't recollect exactly what time the train arrived. It was afternoon train; some time in the evening.

136 Ques. Did you see him that evening in the Grand Cañon or the mouth of the cañon?

Ans. Yes, sir; near the mouth of the cañon.

Ques. Will you tell what he was doing there?

Ans. We went up together to look at the cañon.

Ques. At that time he was not chief engineer of the Cañon City Company?

Ans. I don't know.

Ques. Do you know on what business he went to Cañon City from Pueblo?

Ans. No, sir, I don't positively.

Ques. He didn't tell you?

Ans. No, sir.

Ques. Did you have any conversation with him as you went up to the cañon that day?

Ans. No, sir, very little, if any; some general conversation.

137 Ques. How many men did you find there at work in the mouth of the cañon the evening of the 19th, when you and Mr. Robinson went up?

Ans. I should think there was about ten men; I didn't count them; there was a gang of men, may have been a dozen, ten or a dozen, I should judge.

Ques. You met Mr. Weitbrec there, did you not?

Ans. Yes, sir.

Ques. Did Robinson and Weitbrec have any conversation about this? Objected to. Objection sustained.

Plaintiff wants to show that Robinson was there
138 exercising control before he was appointed on the 19th. Objected to. Objection sustained.

Ques. I ask you if you knew where the large majority of all the men at work in the Grand Cañon of the Arkansas on what is called the Cañon City and San Juan Railroad were brought from?

Ans. The most, I think came up from below somewhere, I don't know where they came from. Some of them came from Cañon City. They were hired.

Ques. You know where some of those that came from abroad came from?

Ans. No, sir, I do not.

139 Ques. Do you know who brought them there,

TESTIMONY FOR PLAINTIFF.

FOLIO

CROSS-EXAMINATION OF H. R. HOLBROOK.

Ques. What is your business or profession?

Ans. Civil Engineer.

144 Ques. You say you are Chief Engineer of the Cañon City and San Juan Railway Company?

Ans. Yes.

Ques. That you were such in the early part of '77?

Ans. Yes.

Ques. That you located a line through the Grand Cañon?

Ans. I located it, yes sir.

Ques. State what you did in locating that line?

Ans. I set numbered stakes every fifty feet.

Ques. Throughout its entire length?

Ans. Yes, sir.

Ques. Permanent stakes?

Ans. Yes, sir.

Ques. Such stakes as are usually used in a survey of a line of railroad in locating it?

Ans. Yes, sir.

145 Ques. Who assisted you in doing it?

Ans. There was Mr. Brandegee and Mr. Stimpson, and several other men.

Ques. For how far did you locate a line?

Ans. For about twenty miles above Cañon City.

Ques. Did you plat that located road?

Ans. Yes, sir. Objected to as not cross-examination, and the last question and answer withdrawn.

Ques. You say Mr. Robinson, on the 19th of April last, went in company with you to the mouth of the cañon?

TESTIMONY FOR PLAINTIFF.

FOLIO

Ans. I think we were at the mouth of the cañon.

146 Ques. What time in the day?

Ans. It was towards night, about sunset, I think.

Ques. Found a force of men employed above there at that time?

Ans. Yes, sir.

Ques. Was Mr. Robinson at that time assuming any control of these men?

Ans. No, sir.

Ques. Giving any orders?

Ans. No, sir.

Court adjourned until 2 o'clock.

JAMES A. McMURTRIE SWORN.

Ques. What position, if any, do you hold in the Denver and Rio Grande Railway Company?

Ans. Chief engineer.

Ques. How long have you held that position?

147 Ans. Since about three years.

Ques. Had you any employment in the Company as early as 1871?

Ans. Yes sir.

Ques. Are you acquainted with the Grand Cañon of the Arkansas?

Ans Yes sir.

Ques. When, if at all, did you make a survey in that cañon first?

Ans. In January and February, 1871.

Ques. You may state the character of that survey, as to its being a preliminary or final survey?

Ans. It was a close preliminary.

Ques. Explain what that means?

Ans. It is a line run very near location, with the exception that it has no curvature in it.

FOLIO

Ques. State where the correction in the line
148 as to curvature, would be made on the ground or at some other place?

Ans. The location of curves could be made in the office and afterwards, and put in the ground from the line already surveyed.

Ques. You may state how nearly that was a completed survey, so far as to make it a location of a line?

Ans. All that would have been required was to put in the curvature.

Ques. State now, as an engineer, whether in locating a line for the construction of a road, it is usually or ever made accurately—the survey ever made accurately, correct, so that there are no
149 changes when you come to construct?

Ans. Very seldom.

Ques. When did you make a survey of that cañon since January, 1871, as you have already spoken of?

Ans. In January, 1872, I continued the survey four miles—between four and five miles, I don't know the exact distance.

Ques. At the time of your survey in '71 and '72. state what you did, if anything, to mark the line of your survey?

Ans. I put stakes in the cañon every hundred feet, and on points where it is necessary put a plus in—what I mean by a plus is a stake bet-
150 ween the hundred feet, from Cañon City bridge to McCandless Park, where what is now called the twelve mile bridge, that gulch comes down. There, in '72, I continued the same survey between four and five miles further.

Ques. You havn't answered that part of the

FOLIO

question that referred to what you did to mark that survey?

Ans. I put stakes in.

Ques. What, if any marks, did you put on those stakes?

Ans. I put numbers on the stakes, marking
151 them. The station at Cañon City bridge I believe was 37. They were numbered consecutively right through the cañon.

Ques. How much, if any, of that cañon was left without surveying and staking?

Ans. Not any of it.

Ques. When since 1872, if at all, have you made a survey through that cañon?

Ans. We started a survey on the 19th of April, and ran up the cañon about three miles, I think, and we were stopped by the Court, and after the Court had rendered a decision, we made a survey from there, well, through to South Arkansas—continued it on since that time.

Ques. In whose employment and for what
152 company, if any, did you make the surveys, in 1871 and 1872.

Ans. The Denver and Rio Grande Railway Company.

Ques. To whom did you report that survey?

Ans. To Col. Greenwood.

Ques. What position did he hold in the road—the Company—at that time?

Ans. General manager.

Ques. In making the survey in April, 1878, of which you have already spoken, how many, if any, of the old stakes which you had set in '71 and '72 did you find in the cañon.

Ans. I saw but very few of them at the lower
152 end of the cañon, in the Royal Gorge I saw a

number of them still standing on the rocks above high water mark.

Ques. In going through that cañon in April, 1878, from the mouth of it to the head of it, what other stakes, if any, besides those you had set in 1871 and 1872, did you find in that cañon?

Ans. I found a line of stakes there; I don't know who set them though.

Ques. How many, if any, did you find in what is called the Royal Gorge?

153 Ans. I found none.

Ques. I understand you found more of your old stakes in the Royal Gorge than anywhere else?

Ans. I found no stakes in the Royal Gorge excepting mine.

Ques. How nearly did your survey made in April, 1878, coincide with that made in '71 and '72?

Ans. About on the same ground.

Ques. State if you know what work was done in '71 and '72 by the Denver & Rio Grande company in the cañon of the Arkansas on the line of survey as you made it, and the character of that work?

154 Ans. In February, '71, I set three or four men to work in the upper end of the cañon, and then I came away. Once afterwards when I was back, a year or so after that, I went in there to look at that work, and also at this last time we were in there I noticed there was a hundred yards of masonry in there, a retaining wall put up. I should think about between four and five hundred yards of material had been moved and road bed partially graded from three to five hundred feet.

Ques. To what width?

155 Ans. The first hundred feet from the lower end of the cañon, I should think had been graded from

six to seven feet wide, the next hundred feet about eight, the next two hundred run all the way from a foot-and-a-half wide up to four feet.

Ques. How did that work coincide with your survey?

Ans. Well, I set side stakes for that work before I left there and instructed a man by the name of Workheiser that was through there on the survey with me to superintend it.

Ques. Do you recollect at this time the wages paid for that sort of work? Objected to as immaterial. Objection sustained.

Ques. How far above the Royal Gorge was this work done?

Ans. It was right at the upper end of the Royal Gorge.

Ques. How many, if any. stakes set by any other company than your own, did you find on that work. when you went through there this last April or May?

Ans. Found stakes in there every one or two hundred feet, scattered along—didn't take notice of them—but I noticed a line of stakes in there—new stakes.

Ques. When you said this work was done in
157 the Royal Gorge, state what you mean by that, whether in the Royal Gorge, or just above it?

Ans. Just above it.

Ques. When you went in last, in '72, and surveyed on four or five miles up above McCandless' bridge, how far did your orders require you to survey at that time? Objected to, and objection sustained.

Ques. In the year '72 or '73, what other work did you do as an engineer in that cañon of the Arkansas river?

FOLIO

Ans. I made a reconnoissance with Col. Greenwood and Mr. Holbrook from McCandless' Park
158 to I think six miles up Poncho creek—about four to six miles we got up Poncho creek.

Ques. Of the survey you made in '71 and '72 what, if any, plats or notes did you make?

Ans. I made a map and profile of the work done in '71.

Ques. Have you that at this time in your possession as engineer?

Ans. Yes, sir, it is in your office.

Ques. You may state what other survey, if any, would have been necessary in that cañon to construct a line of road through there upon that survey of yours?

Ans. Necessary to run over that line and put in the curvature.

156 Ques. State where that curvature might have been put in?

Ans. Put in where all the angles were turned.

Ques. Would it have been necessary to have gone on the ground?

Ans. It would have to have been done on the ground; stakes would have to be put in before the work could have been done.

Ques. State further, what is the usual practice as to when these new stakes, to show the curvature, are put in, before or after beginning the work of construction?

Ans. Well, it depends altogether how fast they want to construct, sometimes done immediately
160 before construction, sometimes the line is located, without a preliminary being run at all. Some engineers are expert enough to locate a line without running a preliminary.

Ques. Now, you may state whether in going

from Cañon City up the Arkansas River westward, towards the South Arkansas, whether there is any other practicable route except that through the Grand Cañon and up the Arkansas Valley. I don't mean possible route, I mean practicable route?

Ans. No sir. I don't think there is.

Ques. What attempts, if any, have you made
161 as chief engineer of the Denver and Rio Grande Railway Company to find any other practicable route to reach that route?

Ans. I have had several lines run; up Grape Creek and across into Texas Creek, down Texas Creek, and down Oak Creek to the Rio Grande River.

The Court. To the Arkansas, you mean. You didn't run to the Rio Grande?

Ans. Down into the Arkansas, yes, sir.

Ques. Were you at Cañon City on the 19th day of last April?

Ans. Yes, sir.

162 Ques. What time did you arrive at Cañon, if at all?

Ans. I think about ten o'clock; between ten and eleven.

Ques. Did you see Mr. A. A. Robinson, the chief engineer of the Atchison, Topeka and Santa Fé Road, on that day at or near Cañon City?

Ans. Yes, sir.

Ques. Where did you see him that day?

Ans. Near the mouth of the cañon.

Ques. Did you observe what he was doing at that time?

Ans. I don't think he was doing anything, only he was coming down out of the cañon; I met him in company with Mr. Holbrook.

FOLIO

163 Ques. Did you see a man named W. R. Morley that day?

Ans. No, sir.

Ques. Did you know Morley before that day?

Ans. Yes, sir.

Ques. Do you know of his having any employment before that day?

Ans. Yes, sir.

Ques. With whom? Objected to, and objection sustained.

Ques. Do you know in whose employment he was on the 19th day of April, 1878?

Ans. No, sir, I do not know positively.

Ques. Did you see any of the men who from the 19th until the 25th were employed in building a railroad or working on the grade in the

164 Grand Cañon of the Arkansas, not employed by your company, the D. & R. G.?

Ans. Yes, sir.

Ques. Had you ever seen recently before the 19th of April those same men at work for anybody else?

Ans. Yes, sir,

Ques. For whom were they employed? Objected to as immaterial, and objection sustained.

Plaintiff's counsel proposes to show that they were taken off of the Atchison, Topeka and Santa Fé Road, and set to work there by some agents who had been employing them before there was

165 any communication or correspondence between these two companies, the Atchison, Topeka and Santa Fé and the San Juan.

The Court. I don't think that is material.

Ques. Did you have any conversation with Robinson or Holbrook on that day, the 19th of April?

Ans. Nothing more than to pass the time of day with Mr. Robinson and Mr. Holbrook, I think; I am not certain.

Ques. Did you have any conversation at any
166 time between the 19th of April and the first of May, with any of the men, employés, engaged in this cañon, in the construction of a railroad grade, other than the Denver and Rio Grande men?

Ans. Yes, sir, I think I have.

Ques. In any of these conversations what, if anything, was said as to who they were working for? Objected to. Objection sustained.

Ques Did you have any conversation with any one of the officers, engineers or contractors, superintendent or foremen of those men in relation to who they were working for?

167 *The Court.* That should be confined to officers of the company. Declaration of workmen not receivable against the company, except in certain cases.

Ques. I will leave off contractors, confining it to officers of the company, and ask you if you had any conversation with them as to who was building a road in that Cañon?

Ans. No, sir, I don't know that I had.

(Hands witness rolls and books.)

Ques. You may take these and unroll them, and explain what each one is? You say you made the profile and map of the route. Show which is the profile Objected that the fact of their making a profile or not making one, mapping it, or not making the map, has nothing to do with the issues. There is no statement in bill or answer, nothing requiring them to.

Plaintiff's Counsel. It simply goes to show the thoroughness of the survey.

FOLIO

The Court. They have a right to show what they did in the location of the line, whether it be much or little; they have the right to prove that they made a survey. Then the question is whether the survey is a sufficent location. It is no objection to evidence of a fact when it has
169 been shown it may or may not be sufficient. Proceed, sir.

Ques. Examine that profile, is that the profile you made at the time?

Ans. Yes, sir. This profile was made from levelings taken at the time.

Ques. When was that made?

Ans. That was made in January, '71.

Ques. How many miles did that cover?

Ans. I think it is nine and one-quarter miles.

Ques. What is that large paper there?

Ans. The map of the line.

Ques. When was that map made?

Ans. In January, 1871

Ques. Explain the difference between a profile and a map?

Ans. One platting the line, the other is the
170 surface of the ground, a cross-section showing the cuts and fills. The map only shows the alignment. The portion on white paper shows the line of '71, on the brown in '72.

Ques. To whom was that report or map returned?

Ans. To Col. Greenwood.

Ques. What are those books you have there?

Ans. Those are the field notes.

Ques. Made at that time also?

Ans. Yes, sir.

The Court. It is not necessary to make it an exhibit, you can state in the notes generally what

TESTIMONY FOR PLAINTIFF.

FOLIO

it is, unless there is some controversy as to the
171 particular character of it.

Ques. I understand you to say you run this angle line in this instance, and that the curvatures can be platted in the office without going on the ground?

Ans. The curvature on the map can be platted in.

Ques. How would you use that map when you came to construct the road?

Ans. You would have to take the map or a copy of it to the field and put the stakes in, with an instrument, as marked off on the map.

Ques. I will ask you further, whether it is
172 necessary in any case to do that before the work of construction is begun, or whether it may proceed along with the construction?

Ans. The stakes have got to be put in before there is any work done.

Ques. And you can go right on ahead, and it can be followed by the constructors?

Ans. Yes, sir, if you have got an engineer corps to keep ahead of them, putting the curvature in.

CROSS-EXAMINATION OF MC MURTRIE.

Ques. What date were you made Chief Engineer of the Denver and Rio Grande Road?

Ans. I don't remember the date.

Ques. In what capacity were you employed in '71?

Ans. I was Assistant Engineer, one of the assistants on the road.

173 Ques. What time in the year 1871 was it that you made that survey?

Ans. In January.

FOLIO

Ques. You said in your direct examination, did you not, that it was done in January and February?

Ans. I was there in January and February, the survey was all completed in January.

Ques. For what distance?

Ans. Nine and a-quarter miles.

Ques. Where did the nine and a-quarter miles commence?

Ans. Commenced at the Cañon City bridge.

Ques. How far above Cañon City?

Ans. It is about three quarters of a mile, from the center of town not quite half a mile.

Ques. And extended it up?

174 Ans. To what is now called the 12-mile bridge.

Ques. Commencing at a point half or three quarters of a miles above Cañon City, and reaching nine miles and a-quarter up the Arkansas?

Ans. Yes, sir.

Ques. How far would that take it above what is known as the Royal Gorge?

Ans. Three and two-tenths miles above the upper end of the Royal Gorge.

Ques. You only put in angle stakes?

Ans. Yes, sir.

Ques. Didn't put in curvature stakes at all?

Ans. No, sir, didn't put in curvatures.

175 Ques. You say that these curves can be put on the map in the office. In a cañon of that kind, with the physical features of that cañon, could you make your curvatures correspond in all instances?

Ans. Yes, it would be very close to your angle line.

Ques. It would require very short angles?

Ans. No, sir.

FOLIO

Ques. You say you could put your curves upon your map, then, in that class of cañon put the curve upon the ground?

Ans. Might not fit exactly when you come to put them in the ground.

Ques. Would there not be places would not fit at all?

Ans. No, sir.

176 Ques. When you speak of putting in curves, you mean to be understood as doing it in open country?

Ans. It is no worse than in an open country, in an open country where there is nothing to bother you, generally run a curved line for a preliminary.

Ques. You didn't run a curved line there?

Ans. No, sir.

Ques. In the location of a railroad, how often are stakes set?

Ans. Every hundred feet.

Ques. Are they not set fifty feet.

Ans. Some places they are, depends altogether upon the engineer. The character of the ground would determine that a good deal. Some put

177 stakes in every fifty feet, some every twenty-five. In that character of ground every hundred feet was close enough.

Ques. Close enough for construction?

Ans. Yes, sir, when they would come to side stake the work, they could put the *pluses* in. The plus is a middle stake between these two.

Ques. I don't understand you as meaning to say that a hundred feet apart was sufficient to commence work?

Ans. No, sir. Sometimes have got to put in

FOLIO

stakes every two or three feet, according to the break of the ground.

Ques. Before you commence work on the ground you have—— ?

Ans. Not on ground where there is no change
178 in the surface. Through that cañon where the ground is changing continually you would have to put in plus stakes.

Ques. Who did you say you was at work for at that time ?

Ans. The Denver and Rio Grande Railway Company.

Ques. Were you at work for the Denver & Rio Grande Railway or the Union Construction Company ?

Ans. Well, it is one and the same thing.

Ques. Explain what they were, if there is any difference ?

Ans. The Union Contract Company is the contracting company for building the road; just as soon as it is completed, the Denver & Rio Grande take it off their hands.

179 Ques. You were at work at construction; in the construction you were not at work for the Rio Grande company, at all, were you ?

Ans. Not directly.

Ques. You were only building a road that would be turned over, when completed ?

Ans. Yes.

Ques. Who were you directly at work for ?

Ans. Directly under Col. Greenwood.

Ques. For what company or organization were you at work ?

Ans. For the Union Contract Company.

Ques. For what company was Col. Greenwood at work ?

FOLIO

Ans. For both companies, as I understand it.

Ques. Then do I understand you to say that
180 the Denver & Rio Grande Company had nothing to do until the work of construction was completed, and the property turned over to them?

Ans. The surveys were generally made under the direction of the Denver & Rio Grande Railway Company, but the Union Contract Company paid for them.

Ques. Were they made under the direction of the Denver & Rio Grande Company?

Ans. Yes, sir.

Ques. Or the Union Contract Company?

Ans. I generally received all the orders I received from officers of the Denver & Rio Grande Company, at that time I received them from Col. Greenwood.

Ques. In what capacity—as an officer of the
181 Denver & Rio Grande, or an officer of the Union Contract Company?

Ans. I don't know how that is, as he was working for both companies.

Ques. Will you say that Mr. Greenwood ever worked for the Denver and Rio Grande Company at all?

Ans. Yes, sir.

Ques. In January, 1872 you continued the survey four or five miles?

Ans. Yes, sir.

Ques. That was a year after your first survey?

Ans. Yes, sir.

Ques. But there was never but nine and one-half miles of that platted?

Ans. Yes, the whole, between thirteen and fourteen miles was all platted, the profile was not made of the last four or five miles.

FOLIO

182 Ques. When you speak of plat, you speak of the alignments, the surface map, do you not?

Ans. Yes, sir.

Ques. But no profile was ever made, except of nine miles and a quarter?

Ans. No, sir.

Ques. No profile put on file or anything? Was there any made at all?

Ans. I think there was; made in the field. We generally make a profile as we go along, hardly ever retain it, generally take a piece of profile paper and plat it along to see that the grades are not too heavy.

Ques. But you think it was never handed over to any one?

Ans. No, sir.

183 Ques. The profile of a road when made by the engineer is handed to the company usually, is it not?

Ans. To his superior officer, to the chief engineer.

Ques. What is the purpose of the profile? To estimate the probable cost of the road?

Ans. Yes, sir.

Ques. You say no profile of this last four or five miles was ever handed to the chief engineer?

Ans. Not that I know of.

Ques. Consequently no estimate of any cost of construction was ever made of that portion of it?

Ans. No, sir.

Ques. Who were you from January, 1872, until you went back into the employment of the

184 company—when was that, in 1875?

Ans. No, sir; I was in the employment of the company continually. I was recalled from that

suvey to make some surveys around Pueblo, we were building our road to Pueblo about that time.

Ques. And you never went back on to that other work until 1878?

Ans. Not to run a line; I made a reconnoisance there from McCandles's Park to the South Arkansas.

Ques. No survey?

Ans. No sir; made no survey.

Ques. Where is McCandles's Park?

Ans. Opposite twelve-mile bridge.

Ques. And you made a reconnoisance from
185 there up. Now, as we are not engineers, tell us what that was?

Ans. Well, it is going over the country, and seeing what the probable cost will be for building a road through there.

Ques. Riding over it, looking at it without an instrument?

Ans. Yes sir; although at that time we took some courses to get the general course of the stream—had a pocket compass.

Ques. No engineering force with you?

Ans. Nobody but Col. Greenwood, Mr. Holbrook and myself.

Ques. All you did at that time was to take some courses with a pocket compass?

Ans. Yes sir; packed our grub on our backs and walked through.

186 Ques. You say in February, 1871, you put some men to work upon that ground up there?

Ans. Yes sir.

Ques. How far had the Denver and Rio Grande completed a line of road at that time, and where from, and where to?

Ans. They had not completed any road, they

FOLIO

were just making their location from here south.

Ques. From Denver south?

Ans. Yes sir.

Ques. Where was the nearest railroad, how far was the nearest finished railroad to the point where you put your men to work?

Ans. River Bend, I think.

Ques. How far was that?

Ans. Some one hundred to one hundred and fifty miles.

Ques. Did you put your men at work up there for the purpose of constructing a railroad?

187 Ans. Well I don't know that they stated what they were put there for. They were put there to do some of that grading at the upper end of the cañon.

Ques. For what purpose?

Ans. For the purpose of securing that line, I suppose.

Ques. For the purpose of securing a line? Was it the intention of your Company to commence at the upper end of the Arkansas and build down?

Ans. I don't know what their intention was.

Ques. Who were these three or four men you put to work there—have you anything to show their names?

188 Ans. No, sir; I don't know who the first three or four were—the last three I put to work.

Ques. Where did you take those men from to put them at work?

Ans. From Cañon City.

Ques. You say that there was some masonry constructed; what do you mean by masonry in engineering?

Ans. Masonry is a wall built out of rock.

FOLIO

Ques. Is it a wet wall or dry wall, or may it be either. Do you commonly call a dry wall masonry?

Ans. Yes, sir; it is a retaining wall—it is masonry—it is a dry wall.

Ques. Ordinary laying up of rock, loose rip-rap work, do you call that masonry?

Ans. Not rip-rap work; no, sir.

189 Ques. What kind of wall was this that was built?

Ans. Well, this was a wall with a straight face, about two-and-a-half feet thick; two feet to two feet-and-a-half thick.

Ques. Laid loose—out of loose material?

Ans. No, sir; it was laid up solid, out of flat rock.

Ques. Dressed?

Ans. It didn't require any dressing—same material they took off the side hill.

Ques. How long did they build that retaining wall, as you call it?

Ans. One wall about sixty feet long, average about fourteen to sixteen feet high; another wall about fifty feet long and about six feet high; and

190 there was two other short walls put in.

Ques. When did you recall your men from there?

Ans. Just quit themselves; I don't know.

Ques. Who superintended them while they were building?

Ans. I don't know that; I think Mr. Workheiser.

Ques. Was he an engineer?

Ans. No, sir; I sidestaked the work, and took him up and showed him where it was.

Ques. How far was that from the Royal Gorge?

Ans. Right at the upper end.

Ques. Which way did it run—run up away from the Royal Gorge?

Ans. Yes, sir.

Ques. How wide was the ground you were at work on there?

Ans. Very little open ground; right on the
191 bench beginning to slope into the mountain; I suppose, a slope of from twenty to thirty degrees, I should think, sloped back four or five hundred feet; raised perpendicularly five or six hundred.

Ques. How wide was the cañon at that place, the bottom?

Ans. Sixty or eighty feet wide; where we did the work was about thirty feet above the river; there was a bench in there.

Ques. Who paid those men?

Ans. I don't know.

Ques. Nor how long they remained there at work?

Ans. No, sir, as I came away from there.

Ques. You say you found a line of stakes on the 19th of April?

Ans. Yes, sir.

Ques. Where did you find them first, at what place?

192 Ans. Found them in the lower end of the cañon first.

Ques. How far did they extend up?

Ans. To the mouth of the Royal Gorge, and from the upper end of the Royal Gorge to McCandless' Bridge; I didn't follow them any further.

Ques. How near were they set together, or how far apart?

Ans. Some places every hundred feet; some

places closer; I didn't notice them particularly.

Ques. You say you don't know who set them, was it the survey of a railroad line?

Ans. All I know who set it is by hearsay, not of my own knowledge.

Ques. How many stakes in all did you find of
193 your original stakes in going up there, through there?

Ans. I didn't count them; I suppose I noticed twenty or thirty of them in the cañon, that is, in the Royal Gorge; I noticed two or three above the Royal Gorge; I could not find but very few of them.

Ques. For what purpose did you go there on the 19th of April?

Ans. To build a railroad.

Ques. Where to?

Ans. To Leadville.

Ques. You didn't go there for the purpose of building a road through Poncho Pass, over into the San Luis Valley? Objected to. Objection overruled.

Ans. No, sir.

Ques. Do you as Chief Engineer of that company, or did you at that time, hear of any inten-
194 tion of building a road up the Grand Cañon of the Arkansas, and through Poncho or Marshall's Pass over into the San Luis valley?

Ans. No, sir; I never had any instructions any further than the South Arkansas.

Ques. As an officer of that company, where was it the intention of your company to build, if you know?

Ans. I don't know.

Ques. You just stated to Leadville,—you were never told so?

Ans. No, sir, they made estimates.

Ques. Were you never consulted in regard to a road the other way, into the San Luis valley?

Ans. No, sir.

Ques. Was there any intention of the Denver
195 and Rio Grande Company, when they entered upon that pass on the 19th of April constructing a road through Poncho or Marshall's Pass into the San Luis valley, and down to connect with your road at Alamosa?

Ans. Not that I know of; don't know anything about the intention of the company. Generally say they want so much road built; that is all they say.

Ques. Was it the intention of the company expressed to you, to build this line of road as a part and parcel of the main trunk line of the Denver and Rio Grande Road? Objected to as immaterial. Objection sustained.

196 Ques. At the point you constructed, or had these two or three men at work to construct the other end of a railroad, was there room for any more track?

Ans. Room on the other side of the river, if they paid enough money for it. It was almost impossible for more than one road to build there.

Ques. You say you have surveyed quite extensively a line up Grape Creek, across into Texas creek, and down the river,—that was since the 19th of April—you can find no practicable route?

Ans. No, sir.

Ques. What do you consider a practicable route?

197 Ans. That depends altogether on the curvatures and the grades they wish to use.

FOLIO

Ques. What do you consider a practicable route for a narrow gauge road?

Ans. Well, one hundred and fifty to two hundred feet grades.

Ques. What curvature?

Ans. Thirty degrees.

Ques. Is it not a fact that two lines can be built in the Grand Cañon with grades not to exceed 175 feet each, or 200 each, and with a curvature of not more than thirty degrees, that distance of not more than a mile and a half through the cañon?

Ans. No, sir; nor with ten.

Ques. There is no such route there?

Ans. No, sir.

Ques. Is there any point in the Grand Cañon
198 or Royal Gorge that there is not ample room for two roads?

Ans. Two roads can be built through there by paying enough money.

Ques. I understood you to say the only purpose of doing that little work that was done up there was for the purpose of holding the right of way in case you wanted to build afterwards.

Ans. I only supposed that; I don't know what the purpose was; my orders were to put men at work.

Ques. Do you not know what the intention of the company was at that time, at all?

Ans. No, sir, I don't know

Ques. Would a company commence at the up-
199 per end, without any connection or transportation, and build a road down?

Ans. Not very likely.

Ques. Do you not know that the only object in doing that small amount of work that was done

FOLIO

was for the purpose of claiming the line in case you wanted to use it thereafter?

Ans. I don't know exactly what purpose—I was ordered to put men at work; I done so.

Ques. Was it, or was it not for the purpose of continuing the construction of a railroad?

Ans. I don't know.

Ques. You don't know whether it was or not?

Ans. No, sir.

RE-EXAMINATION OF McMURTRIE.

Ques. You say it is possible to build two roads
200 through the Grand Cañon, at any point in the cañon; have you ever made an estimate of the difference in expense between the first choice of roads through that cañon and the second choice. You may give it?

Ans. I don't know—have made as close an estimate—I should think a difference of one hundred and fifty to two hundred thousand dollars in the first nine miles through that cañon.

Ques. Have you made an estimate of the cost of construction on the road that you originally
201 surveyed through that cañon?

Ans. Yes sir.

Ques. What is it per mile, at this time? Objected to. Not re-examination. Objection overruled.

Ans. Do you mean what would be the present cost of line, if constructed on?

Ques. Yes sir, on the route you surveyed in 1872?

Ans. I can tell you by referring to my memorandum. Line originally surveyed, present cost at present prices, ten thousand five hundred dollars.

TESTIMONY FOR PLAINTIFF.

FOLIO

Ques. Per mile? What do you mean by construction, grading?

Ans. Just the grading, yes sir.

Ques. Have you made any estimate upon the other side, second choice?

Ans. No sir, not made an accurate estimate, I have looked over the ground.

202 Ques. You say you made no accurate estimates—you looked it over as an engineer?

Ans. (150 to 200) one hundred and fifty to two hundred the first eight miles in the cañon.

Ques. You were asked about the Union Contract Company—I will ask you to state if the Railroad Company don't make its surveys, and then hire the Contract Company to build the road upon the survey, whether that is your understanding of the way they do business?

Ans. I have always understood that the Rail-
203 way Company made the surveys, and the Contract Company worked upon the surveys.

RE-CROSS-EXAMINATION.

Ques. You say you always understood the railway company made the surveys, and the Contract Company worked upon them?

Ans. Yes, sir.

Ques. State who you understood it from, how you came to understand it so?

Ans. I don't know as I understood it from anybody directly.

Ques. Do you now swear that the Union Contract Company didn't make the surveys in those instances?

Ans. No, I don't know as I would, because I
204 don't know positively what they have.

Ques. When you say it will cost them from one hundred and fifty to two hundred thousand

FOLIO

to build one line more than it would another, having made but one estimate you just get at that by guess, do you not?

Ans. Yes, sir.

Ques. You don't state it as a fact, as an engineer?

Ans. No, only an approximate estimate.

Ques. Have you ever examined it for the express purpose of ascertaining what the difference of cost would be?

Ans. No, sir; only during the time we were in the cañon.

205 Ques. Now, you just judge from your general knowledge of the cañon?

Ans. Yes, sir

JAMES R. DE REMER SWORN.

Ques. What position, if any, do you hold in the D. & R. G. Railway Company?

Ans. Assistant Engineer.

Ques. How long have you occupied that position?

Ans. For several years.

Ques. Have you ever been in the Grand Cañon of the Arkansas?

Ans. I have.

Ques. Were you there on the 19th of April last?

Ans. Yes, sir.

Ques. Did you from the 19th of April to the first of May go through the entire length of that Cañon?

Ans. I went to the head of the Royal Gorge, within three hundred feet of the head of the

206 Gorge.

Ques. Did you on the afternoon of that day,

FOLIO

the 19th of April, meet Mr. A. A. Robinson, chief engineer of the Atchison, Topeka and Santa Fé Railway Company?

Ans. I did.

Ques. Did you have any conversation with him?

Ans. Yes, sir.

Ques. State the substance of that conversation?

Ans. I was coming out of the cañon in the evening, about sundown, met Mr. Robinson and Mr. Holbrook in a buggy. Mr. Robinson asked me what we were doing on their right of way? I asked on whose right of way? He said the Atchison, Topeka & Santa Fé. I said I didn't
207 know they had a right of way in there. He informed me they had made their survey and had their plat filed.

Ques. In going through that cañon at any time between the 19th and 25th of April last, did you find any stakes in the cañon, outside of the gorge?

Ans. Of whose?

Ques. Any stakes at all from the mouth of the cañon up to the mouth of the Royal Gorge?

Ans. Yes, sir.

Ques. Could you tell what stakes they were,
208 or for what they were intended by looking at them and the manner in which they were set?

Ans. There were stakes there for two different surveys, two sets of stakes.

Ques. How could you distingush one set from the other?

Ans. One being much older than the other. Could not tell the mark on one set except on one stake, the others were marked with pencil, lead pencil, black mark.

FOLIO

Ques. How many sets of stakes did you find in the gorge?

Ans. Only one.

Ques. How many of those stakes did you find in the gorge?

Ans. I suppose I saw twenty-five or thirty
209 different stakes in there.

Ques. Did they belong to the new class of stakes you discovered outside of the gorge?

Ans. No, sir, they didn't.

Ques. How many, if any, of the new set of stakes did you find in that gorge?

Ans. None.

Ques. Did you at any time after the 19th of April go through the cañon from the head of the gorge up to McCandless Bridge?

Ans. Yes, sir; I completed a survey clear through that.

Ques. How many sets of stakes did you find above the gorge?

Ans. Only one. I found two or three old
210 stakes, was all.

Ques. To which stakes did the stakes belong which you found above the gorge?

Ans. The newer.

Ques. You found three or four of the old ones only?

Ans. Yes, sir.

Ques. Have you conducted any surveys of the D. & R. G. Railway Company outside of the Grand Cañon since the 19th of April?

Ans. I have.

Ques. What routes, have you surveyed on?

Ans. I started at the mouth of the Grand Cañon, crossed the river, went up Grape creek as far as Sand creek, crossed the divide between

FOLIO

211 Sand creek and McCandless Park, run down McCandless Park to the Arkansas river, and then went back; completed the survey through Grape Creek Cañon to the head of Pine creek, and down Texas creek to the Arkansas river, and from Texas creek over to Oak creek and down Oak creek to the Arkansas river.

Ques. What was the character of those different routes for practicability?

Ans. I should not consider them a practicable route at all, sir.

Ques. Have you at any time since the 19th of
212 April had any conversation with Mr. Robinson concerning the building of this railway up the cañon?

Ans. Yes, sir; I spoke a few words to him yesterday on the train?

Ques. Well, I don't care for that; what time in April; what day did you get into the Royal Gorge?

Ans. I think Saturday morning the 20th.

Ques. Who took the first gang of D. & R. G. men into the Royal Gorge?

Ans. I did.

Ques. How much of the Cañon did you traverse during that day, how much of that gorge did you traverse during the 20th?

Ans. Nearly the entire length?

213 Ques. What day and at what time did you see these stakes in the gorge that you have spoken of?

Ans. The old stakes.

Ques. Yes.

Ans. The morning I got in there, between five and six o'clock in the morning.

FOLIO

CROSS-EXAMINATION OF JAMES R. DE REMER'

Ques. You are an engineer by profession, are you?

Ans. Yes sir.

Ques. How long have you been engaged in your profession?

Ans. Several years—about eight years.

Ques. When did you first come into the employment of this Company?

Ans. In February, 1871.

Ques. Where did you first go to work?

Ans. I commenced on the divide between
214 here and Colorado Springs—worked to Colorado Springs.

Ques. You speak of this Grand Canon Royal Gorge, when was the first time you ever was in that?

Ans. In April of this present year, that is, in the gorge. I was with McMurtrie on the survey above McCandless Bridge

Ques. When was the first time you saw it?

Ans. I saw the Grand Cañon two years ago this last 4th of July, the first time I went through it was this present April.

Ques. You say you found two sets of stakes
215 there? Who was with you when you went through?

Ans. I had a party of men with me.

Ques. Was Mr. McMurtrie with you?

Ans. Not at that time.

Ques. How many old stakes did you find in the Grand Cañon before you reached the Royal Gorge?

Ans. Five or six.

Ques. Not to exceed five or six?

Ans. No.

Ques. What is the distance?

Ans. About three miles and a half.

Ques. Were they stakes of railroad survey, or ditch stakes?

Ans. They were stakes of a survey, railroad survey.

Ques. Was there not a ditch survey in there also?

216 Ans. No, sir, not at that place.

Ques. Did you ever find ditch stakes in there?

Ans. No, sir.

Ques. How could you tell whether they were a railroad survey or a ditch location?

Ans. A great deal of difference between them, in the first place, they would not construct a ditch at that point to run down, the country is too rough, could not build a ditch.

Ques. How near the mouth of the Cañon was the first stake you found in going up?

Ans. I don't recollect the distance, a very short distance above, half a mile I presume.

217 Ques. You found on an average a stake about every half or three-quarters of a mile through there?

Ans. I should judge so.

Ques. Were they scattered all through, or were they all in one locality?

Ans. At different points?

Ques. You found new stakes there also?

Ans. Yes, sir.

Ques. What were those new stakes, railroad stakes?

Ans. Yes, sir.

Ques. How near were they set together?

Ans. In most places set every fifty feet apart, in some places every hundred.

FOLIO

Ques. How many of the old stakes did you
218 find in the Royal Gorge?

Ans. I took thirteen out of the gorge. I suppose I saw twenty-five or thirty altogether.

Ques. In what distance?

Ans. A mile and a-half or a mile and three-quarters.

Ques. Allowing stakes to be set every fifty feet, how many stakes would there be in a mile and three-quarters, just a rough estimate?

Ans. One hundred and seventy-five stakes.

Ques. But you found only twenty-five or thirty?

Ans. Yes, sir; I expect a great many had been knocked out—been a long time since they had been in here.

Ques. Did you find them close together, or scattered at intervals?

219 Ans. In some places close together, in other places scattered apart.

Ques. How long a distance did you find without any stakes at all, those old stakes?

Ans. Eight or ten hundred feet in some places.

Ques. You met Robinson and Holbrook in a buggy at sun-down on the evening of the 19th?

Ans. I did.

Ques. At what point?

Ans. Near the mouth of the Royal Gorge.

Ques. How far from it?

Ans. About twelve hundred feet.

Ques. Below or above?

Ans. Below.

Ques. Which way were you going?

Ans. I was going out of the cañon.

Ques. Which way were they going?

FOLIO

220 Ans. Towards the the mouth of the canon.

Ques. They were going up?

Ans. Yes, sir.

Ques. State again what Robinson said to you?

Ans. He asked me what I was doing in there on their right of way. I told him I didn't know they had a right of way. I asked him whose right of way? He said the Atchison, Topeka and Santa Fé. I told him I wasn't aware they had a right of way. He said they had made a survey and filed their map.

Ques. Was Mr. Holbrook with him in the buggy?

Ans. He was.

221 Ques. Could Holbrook have heard the conversation?

Ans. He could.

Ques. Do you say, after thinking this matter over, that anything was said between you, Robinson and Holbrook, except to pass the time of day?

Ans. I am positive of what I say; I am under oath.

Ques. It occurred in that way he asked you what are you doing on our right of way?

Ans. He did, sir.

Ques. Was you on his right of way?

Ans. I was coming down over the line of road; he said right of way of the Atchison, Topeka &

222 Santa Fé Road very distinctly, sir.

Ques. How near to that point is there any Atchison, Topeka and Santa Fé Road?

Ans. Forty odd miles—there is a road at Pueblo.

Ques. Is that the Atchison, Topeka & Santa Fe, of which Mr. Robinson is acting engineer?

Ans. I don't know what is the name of that road—I ueblo & Arkansas Valley, I believe.

Ques. How far is it from that point to any point on the Atchison, Topeka & Santa Fe?

Ans. I don't know.

Ques. Yet Robinson told you you were on the
224 right of way of the Atchison, Topeka & Santa Fe?

Ans. Yes, sir, he did.

Ques. In the presence of Holbrook?

Ans. Yes, sir.

Ques. When Holbrook could have heard it?

Ans. Holbrook was in the buggy.

Ques. You say you got into the Royal Gorge on the 20th; what time?

Ans. Swam the river twenty minutes before four o'clock in the morning.

Qnes. Took in a force of men?

Ans. I did.

Ques Who were in possession of the Grand Cañon below there at that time?

Ans. Nobody in the Grand Cañon at that time.

Ques. How large a force of men did you have?

Ans. I sent a foreman from the lower end of
225 the gorge with twelve or fifteen men, and I went in there with nine.

Ques. You said on your direct examination: I got into the Royal Gorge Saturday, the 20th—took in the first lot of men. How many men were there in that first lot?

Ans. Nine or ten of us.

Ques. Did they all swim the Arkansas River?

Ans. They did, sir.

Ques. Have you ever surveyed the route through the entire cañon, and the Royal Gorge?

Ans. I have.

TESTIMONY FOR PLAINTIFF.

FOLIO

RE-EXAMINATION OF JAMES R. DE REMER.

Ques. You say in your cross-examination that you met Mr. Robinson and Holbrook a little way
226 below the mouth of the Royal Gorge, in a buggy?

Ans. I mean mouth of the cañon—I meant to say.

Ques. Which side of the upper flume, below or above. Objected to. Objection overruled.

Ans. Below it.

Ques. You say you went into the employment of the Company in '71, in January?

Ans. Yes.

Ques. That you assisted McMurtrie in making a survey above the cañon, in '72, what year?

Ans. In '72, I believe.

Ques. At that time you were not in the cañon at all?

Ans. No sir. (Handed book.)

227 Ques. I ask you if this book contains the notes made of that survey? Objected to and question not answered.

JOSEPH BREWSTER, SWORN.

Ques. Where do you reside?

Ans. Rosita.

Ques. Are you in any way connected with the Denver and Rio Grande Railway at this time?

Ans. No, sir.

Ques. Have you ever been in any capacity?

Ans. Yes, sir.

Ques. At what time?

Ans. In January and February, 1871.

Ques. In what capacity?

Ans. Assisting Mr. McMurtrie in making a survey of the Grand Cañon.

FOLIO

Ques. How much of the Cañon did he survey at that time, if any?

Ans. Something over nine miles, I think.

Ques. At what point did he begin?

Ans. Begun at the bridge at Cañon City.

Ques. To what point did he go?

Ans. To McCandles's Park.

Ques. What did he do to mark and designate the line of his survey?

Ans. Placed stakes along the line.

Ques. Do you remember the distance at which he set the stakes apart?

Ans. A hundred feet the most of them.

Ques. Did you assist throughout the entire survey at that time?

Ans. Yes, sir.

Ques. Have you been in that Cañon since at any time?

229 Ans. I have been in above the Royal Gorge. I have never been through the Cañon since.

Ques. Did you go through at that time entirely?

Ans. Yes, sir.

Ques. Do you know at this time who set the stakes drove there?

Ans. I don't remember; I did some of them and the other parties that were assisting—changed works.

Ques. Did you at any time afterwards have anything to do with any work done in the Cañon in the way of grading?

Ans. No, sir.

Ques. Did you ever see any one at work up there on the line of that survey?

Ans. Grading? No sir.

TESTIMONY FOR PLAINTIFF.

FOLIO

JOHN K. BREWSTER, SWORN.

229 Ques. Do you hold any position in the Denver & Rio Grande Railway Company at this time?

Ans. No, sir.

Ques. Have you at any time heretofore?

Ans. Yes, sir.

Ques. At what time?

Ans. In 1871, the winter '70 and '71.

Ques. What, if any, assistance did you render any one in surveying a line through the Grand Cañon for the Denver & Rio Grande Railway Company?

Ans. At the time of that survey, in January and February, 1871, I kept camp there, in camp
230 about Soda Spring was supplying them with food, supplies, work of that kind.

Ques. Who at that time had charge of the surveying party?

Ans. Mr. McMurtrie.

Ques. You didn't go along with the company surveying?

Aus. No, sir.

Ques. Have you ever been through that cañon since that survey was made?

Ans. I think not, not all of it. I have been in parts of it, but only this year.

Ques. Do you know of your own knowledge of any work having been done by the railway company in the way of grading on the survey made by Mr. McMurtrie in 1871?

Ans. No, sir, only as men told me. I didn't see any work done.

Ques. Were you at or about the cañon from the 19th of April to about the first of May of this year?

FOLIO

Ans. Yes, sir.

Ques. Did you have any conversation with Mr. Robinson or Mr. Strong in relation to the building of this road through the cañon?

Ans. No, sir, not any.

Ques. Had you any conversation with any o the directors of the Cañon City and San Juan Railway Company?

232 Ans. I don't know that; I know who the directors are of that company; I had conversation with people at Cañon who I suppose were directors.

Ques. Who?

Ans. Well, Mr. Clelland, Alling, Rockafellow, Raynolds, are directors—Megrue. Yes, sir, I had I think some slight conversation—no very extended conversation.

Ques. Did you have a conversation with them as to who was building this railroad that they claim is theirs now?

Ans. No, sir; it was always spoken of by them in connection with the broad gauge from Pueblo—that is the way it was generally termed

233 broad gauge road from Pueblo.

Ques. Well, in any of their conversations with you in relation to the building of this road, what, if anything, did they ever say about the Atchison, Topeka & Santa Fé company building the road?

Ans. It has been usual, and, I think then the term Atchison, Topeka & Santa Fé was used. It has been usual to all at Cañon City. I reside at Cañon a portion of the time. Speaking of the construction of the road to call it the Atchison

234 and Topeka road.

CROSS-EXAMINATION OF BREWSTER.

Ques. Who did you have that talk with?

Ans. Well, sir, I spoke to Mr. Rockafellow.

FOLIO

Mr. Clelland spoke to me. Talked with Mr. Raynolds.

Ques. Tell us what Mr. Clelland said?

Ans. McClelland met me one day on the streets knowing that I was living there, and my connection with the Central Colorado Improvement Company, perhaps led him———. Objected to. He said to me: Sir, I understand that the Denver & Rio Grande Company are going to lay iron along the street here. Wanted to know if I knew it was so—true. Told him I did not.

Ques. Was that all?

Ans. That was about the sum and substance of what he said then; I don't recollect I had any more conversation with him about the road.

Ques. Tell us what Mr. Rockafellow said?

Ans. Any conversation I had with him in regard to the matter was, that he was sorry that there should be such an opposition to the extension of the broad gauge road, our road he spoke of.

236 Ques. Did he say broad gauge, or our?

Ans. He said both.

Ques. Which did he say?

Ans. He said both, sir.

Ques. Tell us what Raynolds said?

Ans. I don't know that Raynolds' conversation, sir, was particularly with regard to the construction of the road, it was more with regard to business; some fault which he was finding with Denver and Rio Grande Road for what he understood to be some change of policy, growing out of the railroad contest which was going on at that time.

Ques. That was all of that?

Ans. I believe so; yes, sir.

TESTIMONY FOR PLAINTIFF.

FOLIO

237 J. E. CARTER, SWORN.

Ques. Have you ever been in the employ of the Atchison, Topeka & Santa Fé Railway?

Ans. I have, sir.

Ques. In what capacity?

Ans. Well, of the Atchison, Topeka & Santa Fé Railroad Company in the capacity of bridge department first; the first work I did was on the Kaw River bridge, at Topeka.

Ques. Have you at any time since the 19th of April been employed in and about the construction of a road in the Grand Cañon of the Arkansas?

238 Ans. I have, sir.

Ques. In what capacity was you there employed?

Ans. I was the general foreman there in charge of the men.

Ques. Who employed you to take charge of these men?

Ans. Mr. Robinson hired me, sir; Mr. A. A. Robinson.

Ques. About how many men did you work there?

Ans. Well, there was fifteen foremen of those men, no one had less than twenty men, some of them had as high as sixty.

Ques. And you had control of the whole; you were superintendent of construction as I understand?

Ans. No, sir; I was simply foreman in charge;

239 I never saw any superintendent of construction whilst I was there.

Ques. About what time in April was it you went there?

Ans. Sometime between the 20th and 24th; I

FOLIO

don't remember exactly; I think though the 22d or 23d.

Ques. Did you know any of the men who were employed in that cañon as laborers?

Ans. Yes, sir.

Ques. Do you know from where they were sent to that cañon to work?

Ans. Well, I know there was three or four of the foremen were sent off the main line of the road, one in particular, was sent from Osage.

240 Ques. That is in Kansas, is it?

Ans. Yes, sir.

Ques. Do you know by whom they were sent?

Ans. No, sir, I do not.

Ques. Did you recognize any other men who had occupied positions on the road, any part of it, between Kansas City and Pueblo, section men?

Ans. Yes, sir; there was a man by the name of Fry, he was foreman; a man by the name of Holly, who run a floating gang; a man by the name of Bolander, who was running a section at Osage,

241 who had been on this Osage section previous to my coming to the cañon.

Ques. Who made out pay checks for these men?

Ans. There was a time keeper, assistant time keeper and clerk; they made them out; I signed them across the face; Robinson countersigned, and they were then paid—or Mr. Morley. Mr. Robinson was not there at all times. Mr. Morley used to do it. Also, Major Tom Anderson.

Ques. Do you know where the funds with which these men were paid came from?

242 Ans. They came out of the Fremont County Bank. That is, the second day they were paying off they run out of money; Mr. Raynolds came

FOLIO

to me; says he: I will have to close up, can't let you have any more, because I must protect my depositors. Says I, You can't stop now. I didn't see anything about the money after the work was stopped by an injunction. The men during my time were not stopped by an injunction. The injunction was served the day I left. Mr. A. A. Robinson gave me a check for my services. Bradley, agent at Pueblo, cashed it for me.

243 Ques. Whose agent is he?

Ans. Supposed to be agent of the Atchison, Topeka & Santa Fé Railway Company—was at that time.

Ques. In any of your employment and operations in the Grand Cañon, what control over you had the Cañon City & San Juan Company?

Ans. Well, to tell you the truth, sir, I didn't know there was such a company until I had been there seven or eight days. That gentleman there told me—Mr. Clelland. The first official notice I had of it was from Mr. Robinson, to change the checks and write Cañon City & San Juan Railway Company. Also, make my pay-rolls out the same way.

Ques. What, if anything, do you know about special trains being sent from Kansas City over the Atchison, Topeka and Santa Fé road to bring men out to work on this Cañon? Objected to as unimportant and objection sustained.

Ques. What do you know about the Atchison
245 and Topeka Company or its officers for a few days after the 19th of April gathering up men along its line of road and sending the men to work in this Cañon?

Ans. I know there were men gathered up in every town along the line of road, upon my ar-

FOLIO

rival at Cañon. I know some of these men were sent from Topeka, I identified some of these men, because I had seen them around Topeka. I presumed the Santa Fé Road took them there.

Ques. After the men were stopped working by the injunction, where did they go to get their

246 pay that was in arrears?

Ans. Well, I have been recently employed on the Kansas Pacific Road, some of the men I had there in the Grand Cañon worked for me on the Solomon Valley Branch of this road, and they told me (objected to) my own knowledge is I identified two men to Mr. Moore previous to my leaving, I took the men up and identified them as men having worked there. I presume they got—Mr. Moore was the paymaster of the road.

Ques. Of what road?

247 Ans. Of the Atchison, Topeka and Santa Fé. Whether they got their money or not, I don't know.

CROSS-EXAMINATION OF J. E. CARTER.

Ques. How long did you remain in that official position or employment up there?

Ans. About sixteen days. I was there, sir.

Ques. What was that position, what did you do?

Ans. I stated I was in charge of the foremen there and the men, looking after the men in capacity of general foreman over other foremen, and the men and the work.

248 Ques. What were you told were your duties when you went to work?

Ans. My duties, I was told to hold that line as near as I could.

Ques. You took charge of the other foremen and their men?

FOLIO

Ans. Yes, sir.

Ques. You didn't remain in the employ of that company long, the San Juan Company up there?

Ans. Sixteen days.

Ques. There was a little disagreement, was there not, and you was discharged?

Ans. The disagreement happened after I left there.

Ques. You were discharged?

Ans. Yes, sir. I left there after I got to Topeka. I was transferred from that road over to the Trinidad division of the road. While in Topeka
249 Robinson sent me a telegram that my services would not be required. I resided at Jackson.

Ques. Have children?

Ans. I have.

Ques. A wife?

Ans. She is dead.

Ques. At the time you were at Cañon City, were you not insisting upon going home because your wife was very sick? Objected to. No answer.

Ques. You say that you know these men were gathered up all along the road at every town?

Ans. Well, there was one town was going to return a vote of thanks to the Atchison, Topeka and Santa Fé for taking out the tramps and paupers. I was right at the roadmaster's office when they were put on the train.

Ques. Had they been in the employ of the Atchison, Topeka and Santa Fe before?

Ans. I don't think they had.

Ques. You say some of the men you recognized had been in their employ?

Ans. I don't know how long. Andy Bolander had been several days to my knowledge.

Ques. How long was it before that you knew
251 him to be in the employ of the Company?

Ans. Well, a week or ten days, such a matter as that.

Ques. How many other men did you recognize?

Ans. Mr. Holly, a gentleman who runs a floating gang there—he is a foreman.

Ques. Who else?

Ans. Mr. Hi. Ream, Oldman, Jim Morton, a man by the name of Fry.

Ques. Who else?

Ans. Well, there was Bolander's brother.

Ques. Who else?

Ans. Well, I don't know Mr. Reed, that I can enumerate every man. I can simply say this, section men were picked up and sent from all
252 along the line. I know it, because I recognized the men. Passed them back; had orders to.

Ques. Where have you been for the last two weeks?

Ans. Right here. First of July finished short road, twenty-two miles of it. I came down here with Mr. Edgerton. Saw an officer of the road, told me he had had nothing to do at present. If I would wait a little while—.

Ques. When were you first told you would be wanted as a witness?

Ans. I don't know. I believe the first time I was told, up in Mr. Macon's office.

253 Ques. How came you to come to me on the street, on Saturday, and tell me that you were subpœnaed by the Atchison, Topeka and Santa Fe, and went to know when we were going to want to use you. *Witness objects* to answering.

FOLIO

Ques. When did you commence the construction of that road on Salomon's Fork.

Ans. I didn't commence.

Ques. You say a man at Pueblo cashed your check.

Ans. That is what I said.

Ques Who drew the check, on what bank ?

Ans. Never noticed the check, I noticed the amount, sixty-four dollars, Bradley passed it
254 right over to me, he cashed it I believe.

Ques. It was drawn on a bank, was it not ?

Ans. I suppose it was, it was a check I never noticed, I am certain it was not one of the company's time checks, was not taken to be.

Ques. Such as are usually drawn on banks ?

Ans. I disremember whether it was or not, he wrote the check up stairs, and said have you got money enough to cash this check.

Ques. Who were these men you identified before you left Topeka ?

Ans. They were men I had working up with me before I came to Topeka, sir.

Ques. Up where ?

255 Ans. In St. Louis, some of them, some of them on the Iron Mountain Railroad.

Ques. For what purpose did you identify them there ?

Ans. What would I identify you for, because I simply said how do you do King, or whatever the name, I saw the men in Topeka.

Ques. That is, you mean——

Ans. I took up to Mr. Moore those men that were at work for me in the Cañon, that is the reason I identified them, neither of them had checks, there was some row about the back pay they claimed I was to give and didn't, they asked me

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if I would go up and identify them, so they could
256 get the money.

Ques. You went up with them for the purpose of identifying them, and telling them they were the men they claimed to be, they had no time checks or anything else at that time?

Ans. They didn't show any to me.

ALEXANDER THORNTON, SWORN.

Ques. Where do you reside?

Ans. At Rosita, Custer County, Colorado.

Ques. Did you ever do any work for the Denver & Rio Grande Railway Company?

Ans. Yes, sir, I did.

Ques. Where did you do it?

Ans. In the Grand Cañon of the Arkansas.

257 Ques. What time did you do it?

Ans. During the month of May, 1871.

Ques. What was the character of that work?

Ans. Grading for a road bed for a railroad, as I understood it.

Ques. Was there anything there to guide you in your work in the way of stakes?

Ans. There was stakes there with figures on them, said to be placed there by the engineer.

Ques. Who took you to the place and showed you what to do?

Ans. Mr. Workheiser.

After you had finished your work, how was it prepared for a road bed?

Ans. We built on a level with the line of stakes
258 and made a road bed for about six or eight feet wide.

Ques. So far as done, was it complete or incomplete work?

Ans. I think it was complete. It was about the width Workheiser asked us to make it.

Ques. Leveled?

Ans. Yes.

Ques. What, if any, walls did you build there?

Ans. We built walls on the lower side of the bank in places; they must have been ten to fifteen feet high, in other places no more than two or three feet.

Ques. What, if any work did you find had been done of the same character you were doing?

259 Ans. When we went in there for a distance of three hundred feet there was indications of work having been done in small patches, but no regular grading, like what we did ourselves.

Ques. When did you discontinue your work?

Ans. We had connected some of this, some was still disconnected. This was in May, 1871.

Ques. What difficulty would there be in a person passing through that cañon on the same side that this work was done, discovering that this work was there? Objected to.

The Court. That is his opinion. State what was done.

Ques. Have you been in that cañon since?

260 Ans. Not at that particular point. I have not. I have been in the cañon lower down, but never at that particular place where we worked.

Ques From what point did you enter the cañon, and from what point did you leave it when you had completed your work?

Ans. Entered in the side of the cañon, some distance above there, probably about five hundred feet above the Royal Gorge.

Ques. Did you leave by the same route. Objected to as immaterial.

Ans. Yes, sir; left by the same route.

261 Ques. That was in May, 1871?

Ans. Yes, sir.

Ques. How many men employed there?

Ans. Three men employed about one month.

Ques. Do you recollect the number of days?

Ans Twenty-two days.

Ques. How much work had been done there when you went there?

Ans. I could not tell, a number of places, spots ten or fifteen feet in width, I should suppose.

Ques. A little scratching on top of the ground?

Ans. No connected work at all; it was merely in patches.

Ques. All the work that was done after that
262 to your knowledge was twenty-two days work for three men?

Ans. That was all that we done; I don't know anything about how much. There was several places where we built wall, one place twenty or thirty feet long, and ten or fifteen feet high.

Ques. What kind of a wall was it?

Ans. It was a dry wall, built with rocks we found there, in one place it must not have been less than fifteen feet high.

Ques. The balance of the way how high?

Ans. In places it was not more than two or three feet, this high place a kind of a little gap
263 washed out in the bank I don't suppose the highest part of it was more than ten feet in length, could not have been from the foot of the ground.

Ques. What was the character of the ground where you were?

TESTIMONY FOR PLAINTIFF.

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Ans. It was a sloping bank, kind of a slide, rock soil carried down from above.

Ques. About what angle did the ground slope there?

Ans. I should think about forty-five degrees.

Ques. How wide was that valley?

Ans. No valley at all, nothing but a cañon below us.

264 Ques. What was there where you were?

Ans. Where we were it seemed to be a kind of natural bench where this slide rock settled upon.

Ques. How far were you above the head of the Royal Gorge?

Ans. Wasn't but two or three hundred feet.

Ques. How near the Royal Gorge was the end of your work?

Ans. I couldn't exactly say, wasn't but a short distance, the whole distance we worked didn't exceed five hundred; from this gulch we went down to the Royal Gorge; betwixt this and the Royal Gorge is the work we did; Mr. Rockafellow employed me; Werkheiser took us up and showed us where to work.

Ques. Who was Werkheiser?

Ans. He was a gentleman in the employ of Rockafellow; I believe as a clerk.

Ques. You never have been at that point since that time, at the place where you worked?

Ans. No, sir, I never was; I have been above in the Cañon.

W. J. ROBINSON, SWORN.

Ques. Did you ever do any work in the Grand Cañon?

Ans. Yes, sir.

Ques. For whom did you do it?

Ans. Mr. Rockafellow employed me.

266 Ques. What was the character of the work you did?

Ans. In the shape of a grade.

Ques. For and with whom did you work?

Ans. I don't know; they told me I was working for the Rio Grande Company; I worked with Mr. Thornton and Mr. Pringle

Ques. You say this work was intended as a grade for what?

Ans. Railroad, I suppose.

Ques. Stakes there; you completed it there as far as you did it?

Ans. As far as we done, we made it as near complete as we could.

Ques. What did you work by, who showed you where to work and how to work?

Ans. There were some stakes along where we worked; Workheiser went up with us and showed

267 us where to work; there had been some work done previous; it had been worked in spots along; we worked more in one place; levelled along as far as we went.

Ques. How much of this disconnected work did you level up with the work you did?

Ans. I don't recollect; it might have been a hundred or two hundred feet.

Ques. What, if any, walls did you build or put up there to retain the bed of road in its place?

Ans. We built one or two in different places, two, I believe; one we built up about level and

268 the other we did not quite finish, as near as I recollect.

Ques. What was the character of this masonry, substantial or tumble-down work?

TESTIMONY FOR PLAINTIFF.

FOLIO

Ans. Well, we built as substantial as we knew how, as well as I recollect, it was between two and three feet thick; the rocks were of a flat nature and built as straight as we could

Ques. How far above the Royal Gorge, if above at all, was this work done to the best of your recollection?

269 Ans. It was only a short distance; I could not exactly tell how far it was.

Ques. Have you seen that work since you left it?

Ans. No, sir.

Ques. Have never been in the cañon since?

Ans. No, sir, I have not; not at that point.

CROSS-EXAMINATION OF W. J. ROBINSON.

Ques. State how many men you worked there?

Ans. Three.

Ques. How long?

Ans. I think it was twenty-one or twenty two days, as near as I can recollect.

Ans. How much work had been done before you went there?

270 Ans. I don't know; I saw there was considerable work had been done in places.

Ques. Scratching, eh?

Ans. In places grading for five or six feet; little points; eight or ten feet in a place; twenty, perhaps; Mr. Workheiser showed us where to go to work.

Ques. What engineer in charge?

Ans. No engineer.

Ques. Who superintended the work while you were there?

Ans. Workheiser.

Ques. How often did he come?

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Ans. He came twice, I believe.

Ques. Was that the entire force engaged on that road at that time?

Ans. That was all I seen.

Ques. Did you hear of any other force at any other time?

Ans. No, sir, I did not.

271 Ques. That was in May, 1871?

Ans. Yes.

ROBERT F. WEITBREC, SWORN.

Ques. What position, if any, do you hold in the Denver & Rio Grande Railway Company?

Ans. I am the treasurer.

Ques. Can you explain the business transactions between the Denver & Rio Grande Railway and the Union Contract Company—how they contract and operate together?

Ans. The Union Contract Company is a Pennsylvania corporation, that was organized for the purpose of constructing railways, and it has a con-

272 tract with the Denver & Rio Grande Railway to build its line of railway from Denver to El Paso, and the stipulations of the contract are that the road shall be built. Objected to.

Ques. In carrying out this arrangement, who makes the survey, the contract company or the railway company?

Ans. The Engineer of the railway company?

Ques. Under whose supervision and control?

Ans. Well, I suppose it would be competent to say, to express the wording of the contract in answer to that question. It is stated that the

273 railway shall be constructed in accordance with surveys that are made by Engineers of the railway company.

FOLIO

Ques. In making these surveys, who pays the Engineer, and to whom does he report?

Ans. The officers of the Denver & Rio Grande Railway control him, but it is stipulated in the contract that the Union Contract Company shall pay all the expenses.

Ques. The railway company controls the route, and accepts or rejects the survey?

Ans. Yes, sir.

Ques. Or does the other company do that?

274 Ans. The railway company does that. Defendant objects to that mode of examination.

Ques. Were you in Cañon City on the 19th of April last?

Ans. I was.

Ques. What time did you reach there?

Ans. I reached there about, well, between three and four o'clock, to the best of my recollection, in the afternoon.

Ques. Were you at the mouth of the Grand Cañon that afternoon, or in the mouth of it above the flume?

Ans. I was; yes, sir.

Ques. Did you see Mr. A. A. Robinson, Chief Engineer of the Atchison, Topeka and Santa Fé Railroad that day?

Ans. I did.

275 Ques. Did you see him at the mouth of that Cañon?

Ans. I did, just as I was coming out

Ques. Did you have any conversation with him at that time?

Ans. I had a conversation with him, he stopped, and we passed the time of day, and he said somewhat excitedly, so you are up here on our right of way, and I replied in much the same tone,

that we were not on their right of way, that we were on our own right of way.

276 Ques. About what time of day was that?

Ans. Well, it was about sunset, I should think, six o'clock, as near as I can recollect.

Ques. Do you know how many, if any, men came up on the night of the 19th, or in the morning of the 20th of April last, to work on that Cañon, to work on the road in that Cañon for the so called Cañon City and San Juan Company?

Ans. I have no certain knowledge, all the information I have is from estimating as I saw the men go through the streets, and from hearing the reports.

277 Ques. Do you know where those men came from, and who sent them up there?

Ans. I only know from common report in the streets, and from what Mr. Strong himself told me.

Ques. What did he tell you?

Ans. He told me that they had brought about three hundred of their section men and other track laborers from the line of the Atchison, Topeka and Santa Fé Railroad, and put them to work on that right of way claimed by the Atchison, Topeka and Santa Fe, claimed by Mr. Strong.

Ques. He did not say they were put to work on that right of way, claimed the evening before,

278 on the evening of the 19th, by Mr. Robinson?

Ans. No, not on the evening of the 19th, this conversation I had with Mr. Strong, as I remember.

Ques. I say they were put to work ——

The Court. The whole question is irregular. The form of the question is objectionable.

Ques. What conversation, if any, have you

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had since the nineteenth of April with either Mr. Robinson or Mr. Strong, in which they, or either of them, stated to you that the Atchison, Topeka
279 and Santa Fé Company was building this road in Grand Cañon? Objected to.

The Court If there is any conversation inquire particularly.

Ques. What conversation, if any, have you had with William B. Strong or Aaron A. Robinson, or either of them, in relation to the company who are building this road in the Grand Cañon? Objected to. Objection overruled.

Ans. I will not be certain now whether it was nine o'clock Saturday, the 20th, or 9 o'clock the evening of Friday, the nineteenth of April, but it was one or the other, that Robinson came to my
280 room in the McClure House in company with Mr. Gast and Mr. Raynolds, and Mr. Raynolds presented me a letter, a formal letter which he had written, charging our men with obstructing the cañon and preventing the men of the Cañon City and San Juan Company going in there, and I am not certain now whether it was stated in that letter or whether it was stated in conversation, that fire-arms had been presented to prevent their men passing. I disclaimed any intention of sanctioning anything of that sort. It was
281 not done to my knowledge. In the course of the conversation I can't recall how it came up. Mr. Robinson referred to Mr. Holbrook as the Chief Engineer of the Cañon City and San Juan Company, and the inference—— Objected to At that time then I said it was no use saying anything to me about the Cañon City and San Juan Company, that we knew that was a straw company, and the Santa Fé Company was working

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there; and there was a blank silence all around the room for a moment or two. In a short time
282 they left. That was all the conversation I had on the subject.

Ques. As an officer of the Denver and Rio Grande Company, what do you know about an attempt by the Denver and Rio Grande and the Atchison, Topeka and Santa Fé Railroad Company to make an arrangement for the construction of this road through the Grand Cañon sometime in April or May last in St. Louis, at which Gen. D. C. Dodge was present. Objected to as immaterial and incompetent.
283

The Court. I don't think you can go into that. If you propose to show merely that they were negotiating for some arrangement, that is not within the line of our inquiry; we are inquiring who was building this road; that is our inquiry. Objection sustained.

CROSS-EXAMINATION OF WEITBREC.

Ques. How long have you been connected with the Denver & Rio Grande Railway Company?
284 Ans. Since September of 1871.

Ques. How long have you been connected with the Union Contract Company?

Ans. The same period.

Ques. You say that this Union Contract Company is a Pennsylvania corporation?

Ans. It is.

Ques. A corporation separate and apart from the Denver & Rio Grande Railway Company?

Ans. It is.

Ques. Who are the officers of it?

Ans. Charles S. Hinchman, of Philadelphia, is the president, and William Wagner, of Colorado

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Springs, is the secretary, and the directors of which there are five; I don't know that I can give all their names: Charles S. Hinchman, Josiah C. Wright, of New York, Henry McAlister, of Colo-Springs, are three of the directors. I can't at this moment recall the other two of them.

Ques. It is their business to construct the road?

Ans. Yes.

Ques. Do they construct and equip?

Ans. After the road is constructed, finished and equipped, they delivered it to the Denver & Rio Grande Company.

Ques. Has the Denver & Rio Grande ever built a mile of railway?

286 Ans. Only through this Union Contract Company, by making contract with them.

Ques. Of itself, has never built any road?

Ans. No, not of itself.

Ques Built them by the other corporation?

Ans Yes.

Ques. You say that the engineers are under the control of the Denver & Rio Grande Company, but work for the Union Contract Company; do I understand you right?

Ans. I can only repeat the language of the contract, which says:

Ques. I don't ask you to repeat the language
287 of the contract, after you have been connected with this company that length of time?

Ans The Denver & Rio Grande Railway Company controls the engineers, the engineers select the route of the railway, the Union Contract Company builds the railroad on that right of way on whatever selection they make

Ques. Who pays the engineers?

Ans. The Union Contract Company.

FOLIO

Ques. Tell the Court, please, what control the Denver and Rio Grande Company exercise over an engineer, or ever have.

288 Ans The Denver and Rio Grande invariably sends the engineering party to select the line of Railway, the line upon which they want a road built, they have the right to control any detail whatever in regard to the location of the Railway.

Ques. By that, you mean they have the right to control just where the Railroad shall be built, you mean along what particular route?

Ans. Yes, sir.

Ques Who pays them?

Ans. The Union Contract Company, sometimes.

Ques To whom do they make their report?

289 Ans. To the president of the Denver and Rio Grande Railway.

Ques To the Union Contract Company also?

Ans. They sometimes do.

Ques. To whom do they furnish profiles?

Ans. To the president of the Denver and Rio Grande.

Ques. As a matter of fact, the Union Contract Company has the profiles in its office?

Ans. Yes.

Ques. Has all the road that has been built ostensibly by the Denver and Rio Grande Company been built by this Contract Company?

Ans. Yes, sir.

Ques. Who provides the right of way for the road?

290 Ans. The Union Contract Company has managed that wherever they could get a deed for the right of way, and they have always had the deed made to the Railway Company. Where it was

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the Chief Engineer of the Cañon City & San Juan Company, in reference to it I made a map of the
296 line for twenty miles above Cañon City. Q. What did you do with that map? A. I presented it, turned it over to the Company, to file it with the Secretary of the Interior for right of way; made a map and also estimates of the cost of construction of a railroad. Q. Did you report those estimates? A. Yes, sir. Q. To whom? A. To the San Juan Company. Q. When you were making the survey through there in the spring of '77, did you find any other stakes at that time set through the Cañon? A. I saw a few; yes, sir.
297 Q. From your best recollection, how many did you see? A. Well, I don't recollect. I saw now and then an old stake; I suppose perhaps ten or a dozen through the Cañon. I don't know I didn't count then. (Handed map.) Q. State whether or not that is a tracing of the map that was prepared by you for filing with the Secretary of the Interior. A. Yes, sir. There are no field notes on it; the notes of the alignment are not on the map. I think it is a true tracing of the alignment, but not showing the field notes. The one that was filed the notes of the alignment are on
298 the map, points of beginning and end of curve, and the degree of the curve, and the number of degrees turned. I think it is correct otherwise. Witness produces a map, which he said he made originally, and has the field notes on. Offered in evidence by the defendant and received. Q. I understand you to say that to the best of your recollection you only found some ten or fifteen of the old stakes. A. I didn't count them; I should judge about that number. I saw one oc-

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299 casionally through the Cañon. Q. Did you see any work that had been done before that time in the way of actual grading of a road? A. Yes, sir; saw some work; it was about the center of the Cañon, six miles above Cañon City. Q. State of what that work consisted. A. Some grading done; some retaining walls built for a distance of from three to five hundred feet, I should judge. Q. What money value would you place upon the character and amount of work done there at that

300 time. (Objected to, and objection sustained.) Q. State particularly of what that work consisted. A. There were three or four small gulches on the top of a bench on the north side of the river, about fifty feet above the river, that were filled with earth, and retaining walls were built on the outside embankments that were built across those gulches. Q. Does the road of the Cañon City and San Juan Company, as it was located by you, run over that same line that was partially constructed? A. Yes, sir. Q. Do you mean that

301 that work is included within the right of way? A. It would come partially on our road bed; perhaps wholly. I don't think wholly, but partially. Our grade line would be considerably lower than that. In excavating we would probably take a portion of that road bed.

Cross-examination of Holbrook: Q. In the spring of 1877 you were in the employ of the Cañon City and San Juan Railroad Company as Chief Engineer, you say? A. Yes, sir. Q. And you made this survey, you say; you made an angle line and marked the curves on the ground,

302 putting the curves on the ground, did you, or on the plat? A. No, sir. Q. In the same way Mr.

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McMurtrie explained it might be done. A. No, sir, not exactly. Q. Substantially the same way? A. Not exactly; I had to change the tangents some to fit in the curves. I run a base or preliminary line through the Cañon, and then deduced a located line from that base line; that is the one I filed. Q. You say you stuck stakes every fifty feet, or about that, generally. How far did you stake the stakes apart in the Royal
303 Gorge? A. I am not certain whether I put them fifty feet apart in the Royal Gorge or not. They were a hundred feet or less through the Royal Gorge, and outside of that they were put in every fifty feet, and sometimes oftener. Q. Now, in the Royal Gorge, where did you set your stakes, in the earth or in the ice? A. On the sides of the Cañon whenever we could, and around some rocky points, or under some perpendicular rocks.
304 We set our stakes in the ice near the rocks, and deduced a location from that. Q. You say you set some stakes on the ice. About what proportion of all the stakes in the Royal Gorge were set on the ice? A. Well, I don't recollect. Q. That is, you mean you don't recollect exactly, mathematically; but can't you approximate it? A. Well, I presume half of them, probably; maybe two-thirds were set on the ice. Q. Now, you say that retaining wall and that work done by the D. & R. G. Company in '71 is about fifty feet
305 above the water, forty-five to fifty feet, and you say your line runs partly on that work. A. Well, the centre line is hardly on it; it is nearer the river. Q. Can you give the Court an idea how close your centre line would run to that work? A. It runs in places as near as five feet to it. Q.

In other words, your line would go a little lower than that line there. A. Yes, sir. Q. How can you call that a survey, when your stakes are set forty or forty-five feet below your line; if you set them in the ice of the river, how can you call it a staked line in that gorge, and the stakes forty or
306 forty-five feet below it in some places? A. It was staked, but I deduced a located line. Q. Didn't you say you surveyed and staked this line, and set stakes a portion of the way every fifty feet in there? Do you call that a staked line, where the stakes are forty or fifty feet below the line of survey? Did you ever make any other but a preliminary one? A. Not through the Royal George; I didn't stake it. Q. Then it is
307 true you never did survey a staked line in the Gorge. A. No, sir; I run a connected line all the way there, but I didn't put in the stakes on my located line in the Royal Gorge. Q. Then the truth is, in tracing and attempting to trace your line by stakes, it could be done well enough till you got to the Royal Gorge, but then a person that didn't make the survey could not trace it at all following the— A. He could trace it with an instrument if he had the notes showing him where each stake was, and how far below the grade. Q. Does this plat or map, as you call it in engineering parlance, show where the stakes are
308 when you look for the stakes? A. No, sir; it shows the location deduced from preliminary line. Q. Could an engineer take this and go through the Gorge; the Royal Gorge, and find your line from any stakes you set there, by this map? A. Yes, sir, he ought. Q. How could he do it when the stakes were set in the ice and washed away?

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A. He might trace the line; he ought to trace the line there, perhaps, the stakes are washed away. I presume a good many of them are. Q. Then it is not true that you ever surveyed a line and
309 staked it in that Gorge for the Cañon City and San Juan Railway Company as railroad stakes are usually set to designate a line? A. I run a preliminary line. Q. Did you stake it? A. Yes, sir, every hundred feet. Q. Did you run a definite, fixed and located line, and stake it? A. I didn't set stakes on my located line through the Royal Gorge. Q. I understand you say this is a copy of the map or plat you filed in the land office at Pueblo? A. No, sir. It was filed with the Secretary of the Interior. Q. Was this put on before the copy was filed with the Secretary of the In-
310 terior? A. Yes, sir. Q. Did that copy which went to the Secretary of the Interior have these markings on it? A. Yes, sir. Q. Did you ever see that map since the Secretary of the Interior received it? A. No, sir. Q. Do you know Secretary Schurz's handwriting? A. I think I have seen it. Q. That purports to be his signature; don't it? (Objected to.) *Plaintiff Counsel*—It is offered as a literal copy. *The Court*—How can it be Schurz's signature if it is a copy made by some clerk? Q. Are any of these townships surveyed
311 at all by the United States? A. One of them is; the first; those are dotted lines of sections merely, dotted to indicate they are not run. These section lines of the township you see, are drawn with dotted lines. They are not complete. Q. You returned this plat to the Cañon City and San Juan Railway Company. Did you? A. Yes, sir. Q. Did you return one to any other company? A.

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No, sir. Q. Did you return one to the officer of any other company? A. I think I did. Q. Who?

312. A. Mr. Morse, I think. Q. What company is he an officer of? A. The Atchison, Topeka & Santa Fé. Q. What position does he hold? A. I believe he is Superintendent. Q. Do you know now or did you then what interest he had in it or his company. (Objected to as not cross-examination and immaterial. Objection sustained.) Q. You say you saw in the Cañon some ten, twelve, or fifteen stakes as you were making your survey; what month did you make your survey in? A. I commenced in February, fore part of February, about 8th or 10th and finished in April. I don't

313 recollect the exact time I got through. Q. When you were surveying you found these stakes, you knew perfectly well who had put them there? A. No, sir. Q. Didn't you know before that time the Denver & Rio Grande Company had made a survey through the Cañon? A. I had heard of it. I didn't know it for a fact. Q. That is you mean you didn't know it from personal examination. Q. When you saw this work done could you understand from the character of the work what sort of work that was? (Objected to; objection overruled.) A. Well, it looked as it might be

314 railroad work, but it was most too high up, I thought, for a railroad grade. Q. Three or four feet higher than your line? A. About twenty-five feet above our grade. Q. Where did you find the most stakes—in the Gorge or out of it? A. Outside of it; I don't recollect of seeing any in the Gorge. Q. Did you use any of those stakes as any of yours? A. No, sir. Q. Didn't mark any of them? A. No, sir, Q. Now, these

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retaining walls you saw, you may state what state of preservation they are in—pretty firm? A. No,
315 sir; the highest one is not; it is bulged out in the center, and looks as if it might fall down very shortly; the low walls are in a fair state of preservation. Q. You say they are fifty feet above the river? A. About forty-five. Q. Did you ever measure it? A. Yes, sir. Q. Measured it and found it about forty-five feet? A. Yes, sir. Q. Did you go through the entire length of the Royal Gorge on that survey, or did you have to come out of it and go around? A. There was one point of 265 feet that I had to go up and come down; one point about the centre, where the river was not frozen over, and the walls were
316 perpendicular on each side, and it was impossible to get past without going to the top; that 265 feet we triangulated and got our distance across; continued our line across that. Q. Making your survey, did you connect your survey with the township lines and section corners? A. Yes, sir; the township line; the section lines were not run at that time. Q. And you made a perfect survey without having the section lines to connect with? A. Yes, sir; if the townships were run out after, it is correctly sectionized. Q. Was not that section immediately west of Cañon and embracing
317 the Grand Cañon, subdivided at the time you made your survey? A. No, sir. Q. How long after that was it subdivided, or is it now? A. I think it was subdivided last winter; am not certain about that. Q. After you had made your survey, returned your plats and put in this curvature and all that sort of thing, as you have testified, how do you find the line when you come to

build on it; do you have to make corrections or do you not? A. Sometimes we revise the lines a little—make detailed changes. Q. To what extent do you have to leave in any part of the line; do you have to leave the old survey you made in 1877? A. Well, generally a very short distance—five or ten feet perhaps. Q. What is the greatest distance you have had to leave it any one place up to this time? A. I don't recollect exactly. Q. Do you generally have to go above the line of survey or below? A. Well, we have generally to run below as a rule; sometimes we are right on the line exactly, sometimes a little above or a little below, generally a little below. Q. Is it not a fact that in the construction of the line up to this time, that you have had to vary in
319 some places one hundred and twenty feet? A. There may be one place where we vary that much. Q. And you are constructing on that varied line; are you now the company? A. I don't know whether they have men at work on that now or not. Q. Then the line that you made was not so very accurate notwithstanding you put all the curves in; the survey you made and the map you filed with the Secretary of the Interior was not so very accurate, notwithstanding you put out in the curvature? A. Yes, sir; it was an accurate map of the line? Q. As much so as com-
320 mon? A. Yes, sir; as much accurate as they are usually run. Q. Is it usually the case that companies make their survey and correct it as they build? A. Usually, more or less. Q. It is not necessary to an accurate location of a line that it be so perfect it will need no change when they come to construct? A. No, sir; I never knew it to be so; never knew a perfect location.

TESTIMONY FOR DEFENDANT.

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Re-examination: Q. State the reason why you did not stake your located line through the Gorge?
321 A. In many places the rocks are pendicular; it is almost impossible to put stakes in them without a great deal of trouble and expense. Q. State whether in the manner you located your line it was a correct location, drawn from your base line. A. Yes. I have a plat of my deduced line from the base line and the location line on a large scale.

Here court adjourned till 9 o'clock A. M. Tuesday, July 23d.

TUESDAY.

Defendant called *Robert F. Weitbrec*,—sworn:

Q. You stated yesterday that you were Treasurer of the Denver and Rio Grande Company. A. Yes, sir. Q. What office do you hold in the con-
321 struction company, the Union Contract Company? A. I am Treasurer of that also. Q. How long have you been connected with the first corporation, the Denver and Rio Grande. A. Since September, '71, with the exception of some little work that I did when the certicate of incorporation was first filed. No, it was earlier than that; it was as early as June. I was connected with the Denver and Rio Grande since June, '71; it was a mistake I made yesterday. Q. How long
322 with the other corporation? A. The same period. Q. How much road had been constructed by your company when you became conuected with it, I mean the Union Contract Company? A. There had been no road completed. Surveys were being made south of Denver, and a portion

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of the grade had been made, when I was first connected with the road, but there wasn't much at that time. We were working between Denver and Colorado Springs. Q. At what time was your road completed to Pueblo by the Union
323 Contract Company? A. I only speak from recollection now. It was about the 15th of June, 1872. It didn't vary thirty days from that either way. Q. At what time was the road completed by the Union Contract Company from Pueblo to Labran? A. That was about the 1st of October, 1872. I am only speaking as nearly as I can recollect; don't vary thirty days, I think. Q. October, 1872? A. About the 1st of October, 1872, I think. Q. What is the distance from Labran to Cañon City? A.
324 It is about eight miles or eight miles and a half. Q. At what time was your road completed from Labran to Cañon City by the Union Contract Company? A. It was completed from Labran to Florence, about a mile or half mile beyond that, from there also to the Coal Banks to Cañon City. It was completed to Cañon City some time in July of '75; my recollection of that is indistinct, I can't say whether it was '74 or '75; but the
325 matter could be settled by Mr. McMurtrie's testimony; he was engineer. I think it was '75. Q. And that was nearly three years from the time you had completed to Labran; nearly three years afterwards. A. Yes; two years and a half. Q. Lacking from July to October of three years? A. Yes, sir. Q. How near was your road ever completed into Cañon City? A. Not knowing the limits of Cañon City, I can't answer that question; about three-quarters of a mile from the business part of it, is my judgment, without ever

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326 having measured it. Q. What time did you commence to construct, or did the Union Contract Company commence constructing the road from Pueblo through the Sangre de Cristo range of mountains. A. Didn't commence it from Pueblo; from Cucharas. Q. When did you commence building from Pueblo to Cucharas? A. Commenced there in the summer of 1873. We commenced building from there south; didn't go all the way to Cucharas at that time. Q. What time did you complete your road to Cucharas? A. It

327 was about the 1st of February, 1876. Q. What is the distance from Pueblo to Cucharas? A. Fifty miles. Q. How soon did you complete, or did the Union Contract Company complete the road from Cucharas through the Sangre de Cristo range? A. We reached the town of Garland about the 1st of August, 1877. Q. Where is Garland located, sir? A. It is within five miles of Fort Garland, in an easterly direction from Fort Garland. Q. What is that particular locality, or tract of country, that

328 is in known as. Is it known as the commencement of the San Luis Valley? A. No. The Sangre de Cristo Valley. Q. How near is it to the San Luis Valley? A. Well, if you explain just what you mean to cover by the San Luis Valley. I don't know that I can answer. Q. I may be under a misapprehension. I supposed that entire valley there, for a good many miles in length, was included? A. If you mean from the summit of the Sangre de Cristo range, westerly, to the sum-

329 mit of tne mountain, then it is the waters of the Las Animas, it is in what we know, more particularly as the Sangre de Cristo Valley. Q. What is the distance from Cucharas to Garland? A. It

about sixty miles. Q. When did the Union Central Company complete the road from Garland to Alamosa? A. It was some time in July of this year; the early part of July. I was trying to fix the exact date, but it slipped my memory. Q. In

330 In what direction, if any, are the Union Contract Company, now engaged in constructing a road from Alamosa? A. Southward. Q. Down the valley of the Rio Grande? A. Yes, sir. Q. In the San Luis Valley? A. Yes, sir. Q. What is that road called by the Denver & Rio Grande Company, and generally called; what is it called by your company and the Union Contract Company, that road running from Pueblo through the Sangre de Cristo to Alamosa and down? A. There is not any such road, that comprises two roads. Q. What is that line called? A. It is known gener-

331 ally as the Denver & Rio Grande Railway. Q. You say there is no such line as that known to the companies? A. There are two lines which comprise the lines you speak of. Q. I am asking you what that entire line of road is called, and has been called by the Denver & Rio Grande Company? A. Denver & Rio Grande, it is known that way. Q. Ohat has that road been called by the Denver & Rio Grande and Union Contract Compay, running from Denver to Cañon City? A. The Arkansas Valley Division. Q. Arkansas Val-

332 ley Division, or Branch? A. Division, it has been called, a Branch by the laborers on the road. Q. Has it ever been called so by the officers of your Company? Who has been President of your Company? A. General Palmer. Q. Has it ever been called so in any report by him? A. Not to my knowledge. I don't remember though. Q. State

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what the bonds issued by the Denver & Rio Grande Company upon that piece of road were called. What they were entitled upon their face. A. The
333 first mortgage, seven per cent. gold bonds of the Denver & Rio Grande Railway, Arkansas Valley Division. Q. Division or branch? A. Division. Q. You are certain of that? A. I speak from recollection, I am very positive about that. It is a matter that can be proved by referring to the mortgage. (Handed a pamphlet and asked, look at that pamphlet, the second Annual Report of the Directors of the Denver & Rio Grande Company to the stockholders, by whom is it signed. A. By General Palmer. Q. Look at page 9, at those words enclosed in brackets; state whether your company ever called that a branch? A. So it would appear from this report. Q. Was that report issued by your company and circulated to your stockholders, and circulated generally? A. It was. Q. I wish you would look at the map which accompanies and state whether that is a part of the report as made at that time? A. It appears to be; I can't say for certain, but I have no doubt it was; I don't re-
335 member it was with it, but I have no doubt it was. Defendants now offer in evidence certain portions of this report, the map and the report of the President, and particularly that part of it that occurs on page 9 in regard to the Arkansas Branch; also portions marked on pages 29 and 30. (No objection to that,) Q. For what purpose did your Union Contract Company attempt to enter into and occupy the Grand Cañon on the 19th of April?
236 A. To build a railroad. Q. Where? A. To the South Arkansas. Q. Where then to? A. I had

no instructions beyond that. Q. You were Treasurer of the company? A. Yes, sir. Q. Was that road that was intended to build at that time described in your certificate of incorporation as follows: "Thence up the valley of the Arkansas river to a point at or near Cañon City, thence continuing up the valley of the Arkansas through the Big Cañon of the same to a point at or near the mouth of the South Arkan-

337 sas river, thence by the valleys or the adjoining slopes of the South Arkansas river, and of the Poncho Creek to the summit of the divide, between the waters of the Arkansas and the San Luis Park, known as Poncho Pass; thence by the most eligible route in a general southerly direction down the San Luis valley to the valley of the Rio Grande Del Norte; thence in a general south-

338 erly direction by the particular route which may be determined upon by a detailed survey, to be the most eligible down the valley of the Rio Grande to the southern boundary of Colorado; thence continuing down the valley of the Rio Grande on either side," etc.? A. The road I was instructed to engage in building was that portion of the description which you have read relating to the the line between the present depot of the Denver and Rio Grande railway at Cañon City, as far as the South Arhansas; beyond that I had no instructions. Q. Had you any knowledge of the

339 direction intended to be run from that point of this line you entered upon the Cañon for in April? A. I don't think I clearly understand. Do you mean had I any knowledge the company was going to build this line any farther? Q. Yes, sir;

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I ask you what knowledge you had, if any, of the intention of the compauies as to where they would run that road? A. No positive knowledge that that line would be extended any farther than that point. Q. Then it was not the intention of
340 either the Denver and Rio Grande Company or the Union Contract Company to continue that road through the Poncho Pass and down the San Luis valley to Mexico, was it? A. I don't know. Q. Don't know whether that was the intention of the company or not? A. I don't. Q. Do you not know whether it was the intention of the company to run that line down the Rio Grande to Alamosa? A. I Do not. Q. You don't know whether it was their intention to run through the Poncho Pass at all? A. From the South Arkan-
341 sas? I Don't know. Q. You say your road remained at Labran nearly three years before it was continued to Cañon City? A. Yes, sir. Q. On what conditions, if any, offered you by the people of Cañon City? Did you continue that road, the remaining eight miles, when it was continued? (Objected to, as immaterial.) Defendant proposed to show that they regarded the point at Labran as terminis; had no intention of building any further, and that the balance of it was almost entirely
342 built by Cañon City? A. The people of the town of Cañon City voted to the Denver & Rio Grande Railway Company, fifty thousand dollars in their town bonds, and the citizens of Cañon City donated lands, a certain amount of lands and town lots, it being understood at the time that the nominal value of the bonds and the lands was fifty thousand dollars, bonds and lands together, the face value of the bonds was fifty thousand. Q. The face

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value was the nominal value, was it not? A. The
343 Company agreed that if assistance to the extent of fifty thousand dollars was voted, that the line would be extended to within one mile of some point, I have forgotten—one mile of the McClure House—and it was agreed between the Company and the citizens of Cañon, that that fifty thousand dollars—it being understood that the bonds would only be valued by us at twenty-five thousand, and the lands twenty-five thousand—the bonds were actually fifty thousand on their face. It was
344 agreed that they should contribute the lands; the Company never recognized afterwards that they had fulfilled the agreement. Q. You got a quantity of lands? A. Lands and lots. Q. The consideration of those lands and bonds, was the extension of the road from Labran to Cañon City, eight miles? A. Substantially that; I think the stipulation was, the depot should be located within one mile of the McClure House; that is my recollection of it. Q. Who carried on the negotioations on the part of the Denver & Rio Grande
345 Company with the inhabitants of Cañon City in regard to that extension of eight miles? A. William S. Jackson partly, and I think entirely. He was then Treasurer of the Railway Company. Q. Was not part of it carried on by Mr. Palmer in person? A. Not to my knowledge. I think General Palmer at the time was in New York City. (Handed letter.) Q. Look at that letter and see in whose handwriting it is, and whose signature?
346 A. That is Mr. Jackson's handwriting, and the signature is General Palmer's. This portion here, the last part, commencing with, "in conclusion," is in General Palmer's handwriting, but the rest is Mr.

Jackson's. Q. The whole letter is a letter of General Palmer's? A. Yes, sir, over his signature. (Handed another letter.) Q. Look at that and see whose that is? A. This is Mr. Jackson's handwriting and his signature. (Handed another letter.) A. That is Mr. Jackson's, also.

347 *Cross-examination of Robert F. Weitbrec*: Q. You say when you went up the Cañon the 19th day of April, for the purpose of building a road, your instructions only went so far as the mouth of the South Arkansas. You have not at this time, nor had you at that time any knowledge of the intention of your company as to its further operations in building a road? A. Not in that direction; I knew of other schemes in other points, but not there. Q. Your certificate of incorporation provides for a road from the South Arkansas
348 up the main Arkansas, as well as up the South Arkansas? (Objected to and question waived.) Q. You say you completed the road—your company did to Pueblo about the 15th of June, 1872? A. Yes, sir. Q. You then continued the construction of the road the same year and reached Labran or Florence sometime in October of the same year? A. Yes, sir. Q. And there rested until sometime in 1875, as your recollection is, when the road was completed to Cañon City? You were asked what consideration the company got for building its road to Cañnon City. You say they got fifty thousand dollars in bonds and a
449 sufficient quantity of land to make up the value of the bonds to fifty thousand dollars, as it was estimated? A. That was the theoretical value. Q. The bonds and the land together was considered to be about fifty thousand dollars at that

time? A. Yes. Q. Now you may state what the actual value of those bonds was, to you, or has been to your company? (Objected to; objection overruled.) A. The actual value of the two combined? Q. What has been the value of
350 the bonds to the company, first up to this time? A. The bonds were sold to the Central Colorado Improvement Company for twenty-five thousand dollars. Q. Well, now, what was the actual value at that time, the saleable value of the lands you got, if you know? A. We sold the lands to the Central Colorado Improvement Company for twenty-five thousand dollars. Q. You realized fifty thousand; what proportion was that amount, fifty thousand dollars, of the cost of building and equipping the road from Labran to Cañon City,
352 or from Florence? (Objected; the question should be confined to building.) *The Court*—I think it ought to be limited to building. A. The cost of constructing the road from Labran to Cañon City (I speak now from recollection of accounts of which I had charge,) was something over eighty thousand dollars. I will not be certain that there was not some equipment in that. It is usual for us whenever we build any railroad, to buy rolling stock for it, so I will not be certain that there was not something in that. Q.
353 You have been asked about the form of the mortgage bonds issued on this part of the road from Pueblo to Cañon. I forget what you stated the title of these bonds was, or the designation of the road of the company? A. Well, the substance of the title of the mortgage and of the bonds, too, is, speaks of seven per cent. first mortgage gold bonds of the Arkansas Valley Di-

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vision of the Denver and Rio Grande Railway Company, or Denver and Rio Grande railway—
354 that is substantially the title. Q. Now, under that designation, what does that mortgage cover—how far from Pueblo does it run—from what point to Pueblo? A. Well, I don't know; is not that a legal question? Perhaps I can answer that question by telling you the substance of the first preamble in the mortgage. It recites that, whereas, the Denver and Rio Grande Railway Company has authority under its certicate to build a railroad from Pueblo west to the vicinity of Cañon City, thence through the Big
355 Cañon of the Arkansas, thence continuing up the Arkansas to the mouth of the South Arkansas, thence continuing up the South Arkansas and Poncho Creek to Poncho Pass. That is the recitation first, and then there is another recitation in the mortgage, which refers to the entire thing as the Arkansas Division. I only speak from recollection now, and if there is any imperfection it can be verified by referring to the mortgage. I suppose it is a legal question whether the mortgage as it stands covers the uncompleted
356 part of the line or not. I am not prepared to say anything about that. Q. I thought possibly the mortgage might designate certain points from Pueblo, if you don't know about that. A. Only so far as I have explained in describing a road as a part. The subscription is substantially the same in regard to the Arkansas Valley Division as the certicate of incorporation calls for. It is proper to say that that preamble also recites with branches to the coal and iron mines near Cañon City, and in addition to that there was a company

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organized entitled, as I remember, the Southern
357 Colorado Railway Company. (Objected to.) Q. What is the reason that the company stopped at Cañon City in 1875 or 1874, whichever year it was they completed to Cañon, and desisted from any further extension of the road westward at that time? (Objected to as not cross-examination.) *The Court*—I think it may be. A. The reason was on account of the depressed condition of business, which made it very difficult, if not abso-
358 lutely impossible, to raise money for the purpose of building railroads, especially in the West. Q. You completed your road from Pueblo to Cucharas in 1876, did you? A. Yes, sir. Q. And in 1877 from Cucharas to Garland? A. Yes, sir. Well, we built a portion of that, as far as La Veta, in 1876, and then finished up in 1877 to Garland. Q. Will you explain why it was that you constructed in that direction after 1874, rather than through the Big Cañon? A. Because, in the opinion of the directors and stockholders, the
359 construction of that portion of our railroad system held out the greatest promise of immediate results. Q. For the same outlay of money, it was the opinion of the company that they could reap returns more rapidly? A. Yes, sir. Well, for a less outlay of money. Q. And therefore you expended money at that time on that route, and left the Cañon route unoccupied. A. Yes, sir.

Re-examination of R. F. Weitbrec: Q. You
360 stated something in regard to what those bonds or mortgage contained. Was there a provision in those bonds that they were convertible into main line stock or stock of the main line, or main line bonds? A. I have no recollection on that

subject. Q. Do you say there was not a provision in them that they should be convertible into bonds or stock of the main line? A. I don't
361 say anything about it, because I don't remember.

William H. Greenwood, sworn: Q. State to the court what position, if any, you held in the Denver and Rio Grande or Union Contract Company in former years, and when that relation commenced and when it ended. A. It is very hard to tell when it commenced, as it was principally done by conversation between myself and Gen. Palmer, for probably a year before there was any final settlement. Q. State when your actual duties commenced. A. My memory serves me it was about the 1st of November, from the 1st to the 15th of November, 1870. Q. What was that
362 position? A. It was generally recognized as that of General Manager. I am not certain as to the date, but I think I left the Kansas Pacific in November, and I commenced at the same time. I remained with them until about July, 1874. My memory serves me the final settlement was not made until away in 1875. Q. In whose employ were you during that time? A. The Union Contract Company paid me for my services. Q. What was that Union Contract Company? A. It was a company organized, I believe, under the direction or permission of the Legislature of
363 Pennsylvania. Q. For what purpose? A. For constructing railroads. Q. State how they were connected with the Denver and Kio Grande Railway, if there was any connection. A. There was a contract between the two companies, under which the Union Contract Company was to construct the road for the Denver and Rio Grande.

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Q. To construct it? A. Yes, sir; construct, equip, and perform all the necessary— Q. Which company would acquire the right of way necessary. A. I don't think that question was ever canvassed particularly; either company did whatever they thought they could. Whenever a legal
364 question came up, it was referred to the attorneys of the road for their direction and advise. Q. State whether or not you were connected with that road and in charge of it under the Union Contract Company in January and February, '71. A. I think I was. Q. State whether the survey testified to as having been made through the Grand Cañon and up above there was made under your and management. A. My memory does not serve me as to whether I gave the directions directly to Mr. McMurtrie, or whether I gave them to Mersereau. Q. Who was acting as Chief
365 Engineer? A. Under my general control. Q. What was the object of that survey at that time? A. The object was to retain control of the Cañon for the Denver & Rio Grande Railway Comp'y. Q. For what particular road. A. It was for the Denver & Rio Grande Railway Comp'y. That was the interest which the Union Contract Company was connected with. Q. The Denver & Rio Grande had in contemplation the construction of several lines? A. The intention was to construct all the lines they could get money to build as fast as they could get it. Q. When you speak of the Denver & Rio Grande, what road do you mean to desig-
366 nate by that name? A. The original intention was to build from Denver to Pueblo, thence up the Arkansas River through the Poncho Pass, south to El Paso. Q. Was that the intention at

the time you are speaking of? A. That was my impression from my conversation with General Palmer. Q. In your office; from your knowledge of the affairs? A. The different questions were all canvassed at the same time as to what was the best route, and my advice was to take that route. Q. Do you know of any work having been done in the Grand Cañon or in the vicinity of the Royal
366 Gorge? A. I was told that there was. Q. Did you, as Manager, of that Company, know for what purpose that work was done. (Objected to as leading.) *The Court*—It does not suggest the answer to be given. Objection overruled. A. I was of the impression I did; although General Palmer had authority to counteract anything I could do or say. Q. State what was the purpose; intention? A. The intention was to do work enough to keep the right of way through the Cañon, if they could, as we were afraid some other parties might enter in there and trouble in the construction. Q. At the time that work was done
367 in that Cañon, was there any intention on the part of the Denver & Rio Grande Company, or Union Contract Company to construct a road in that vicinity immediately or soon. (Objected to, as leading and suggestive.) Objection overruled. A. They could not have constructed, as there was no money raised for that purpose at that time. The policy of the Company shows their intention in the organization (of Pools) for building. Q. Could a road have been constructed at that time from that end? A. Of course it could. It would have required to construct from that end first, to
368 commence construction and then haul the iron up there, and then haul your iron back. Q. At what

time, if at any time, was that route abandoned by the Denver & Rio Grande Company for its main line, and the other route selected? A. I could not answer the question, as I did not have any conversation with the parties with regard to it. Q. When did you first know that that route was abandoned as the route of the main line? (Objected to, as assuming that he knows something he does not.) Said objection sustained. Q. When,

369 if ever, did you first become aware that that route had been abandoned, for the construction of the main line? A. The word abandon is one that I should not be able to answer the question. I learned that they had commenced grading whilst in Mexico, through correspondence. Q. You learned while you was in Mexico? A. That was in the summer and spring of 1873. Q. What do you mean when you say, you learned that they had commenced grading? A. That they had commenced preparing the road-bed for ties. Q. On a dif-

370 ferent line or on this line? A. On the road south from Pueblo. Q. You may state if you ever had any conversations with Gen. Palmer or other officers of the company in regard to the change of route of that road, and if so, with what officer, and at what time? A. I had conversation with Gen. Parmer in regard to it. Q. At what time? A. It would be impossible for me to answer, as those questions were canvassed for several years. Q. Was it previous or subsequent to commencement of the building of the main line from Pu-

371 eblo south? A. I should say that I conversed with him both before and after in regard to it. Q. You may state what, if any, reasons Gen. Palmer

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in those conversations gave you for changing the line and adopting the other route for the main line of the road? A. My impressions of conversations were that if we left the short line open from Pueblo to the San Luis valley, and went by another route, some other road might come up and occupy the shorter route, and in that way throw them out of their business by a shorter
372 route. It was my impression of the conversation at all times. Q. Please not state your impressions; state what Gen. Palmer said? A. It would be impossible for me to state the conversation. Q. State the result of it—the substance of it? A. I have stated the substance as near as I can. As I stated before, the substance was by leaving the short line open it would injure the company. Q. When was the first time that Gen. Palmer made those suggestions to you, or used that argument
373 in favor of the other route for the main line? A. I could not tell. I think the subject was canvassed even before there was anything done or the company organized. Q. Were you in the employment of either the Union Contract Company or the Denver and Rio Grande Railway Company at the time of the building of the branch road from Pueblo to Labran? A. Yes, sir. I was in the same position that I had held from the first. Q. State, if you know, how that road was designated by the company? A. I could not tell what
374 the actual words, lawfully, would be. I always understood it as branch in all our conversations. I think we used the word *branch*, though I think the word "division" was in many of the recorded papers. Q. How was it spoken of and regarded

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by the officers of the company? A. I can only give my impression in regard to that; the bonds show that on the face of them—show that it was. Q. How were they designated there? A. I could not tell. I have read the bonds; for me to at-
374 tempt to designate words from my memory would be useless. Q. State whether there was a provision in these branch bonds for conversion into the bonds or stock of the main line? A. I think there was some such provision—that was my impression, but unless I could take a bond and read it, I could not testify under oath. Q. What position, if any, do you occupy now, and under what company, if any? A. I am acting as Assistant Engineer in the construction of the line from Cañon City to the Forks
375 of the Arkansas. Q. In the employ of what company? A. Designated partially as Cañon City and San Juan, and partially as Pueblo and Arkansas Valley. Q. Are you familiar with the Grand Cañon of the Arkansas? A. Reasonably so. Q. State whether or not through the Grand Cañon of the Arkansas, at any point, there is not room for two roads. A. There is room for two roads through the entire length, one on each side of the river. Q. What would be the difference in the
376 cost of construction? A. The cost of construction would depend a great deal upon the maximum grades and the degree of curvature adopted by the corporation intending to build. Q. Well, if built on the most economical plan for the construction of a good road, what would be the difference in the two lines? A. I should rather not answer the question, as it becomes a question of opinion of engineers; and if a person would give

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me the degree of curvatures and the grades, then
377 I could answer the question reasonably; the other is a matter of opinion of engineers. It would cost a great deal more to build on the south side than the north side, and to build cheaply the curves would have to be heavier—sharper. Q. Have you seen lately the work performed under the Union Contract Company in the Cañon in the year 1871 or 1872, whenever it was done? A. I have seen work that was done there where they say work was done. Q. What is the extent of
378 that work? A. There are several retaining walls built there; grading,—could tell but very little about it, as there was work done since that, and I could not designate between the two. Q. I am speaking of old work. A. There was work afterwards done on the same ground, before I saw it, so I could not tell anything farther than the retaining wall. The retaining walls were not laid during the excitement in April or May. This work was done since April or May in the vicinity
369 of the same ground, passing over the same ground, so I could not tell what was done before. Q. You were not in the employ of the Union Contract Company or the Denver and Rio Grande at the time the road was extended from Labran to Cañon City, were you? A. I was still drawing a salary from the Union Contract Company, but I didn't take personal charge of the work, as I had been absent for some time. Q. How long had you been absent at that time? A. About two years. Q. Did you know anything of the negoti-
380 ations between the inhabitants of Cañon City and the Company in regard to that extension? A. Only as I received it by letters from different par-

ties. Q. From the officers of the Union Contract Company, or of the Rio Grande Railway Company. A. No, sir; from private individuals, and from the newspapers—I think I learned it mostly from the newspapers. Q. How long did you remain in Colorado after the road was completed to Labran? A. I remained until December; the road was completed in the last of June, or the first of July. Q. Was it or was it not the intention of
381 the Union Contract Company, or the Denver & Rio Grande Company, to proceed at that time immediately in the construction of its main line through the Grand Cañon and Poncho Pass? (Objected to, as leading. Objection withdrawn.) A. I don't think they intended to. Q. State what, if any thing you know, from your official position, and conversation with the officers of the Denver & Rio Grande Company in regard to that; Labran being considered the final terminus of the road,
387 or the coal banks being the final terminus of the road at the time you left? A. I do not think they considered it a final terminus; the whole intention was to build on whenever they could get means. Q. To build on? Where? A. Whereever they thought it would pay to build. Q. I was asking you in regard to the construction of the main line in that direction. From your official position and knowledge of affairs, and relation to the officers of that Company, can you state whether or not it was the intention of the
383 Denver & Rio Grande Company, at any time, to continue its main line in that direction? (Objected to, as leading.) *The Court*—You seem to place a stress upon the upon the meaning of words; you put an emphasis upon *main line*. I don't

think you can make any distinction in your questions; at all events, you must ask him whether they intend to build a road, and it is for other authority to determine what sort of road it is. (Question withdrawn.)

384 *Cross-examination of William H. Greenwood:* Q. You say you are now engaged in some capacity. I didn't hear you state what it was? A. With the Cañon City and San Juan Company, and the Pueblo and Arkansas valley Company. Q. State what that position is? A. As an engineer; I have charge of the construction. Q. How long have you had charge of this construction? A. I think I reported for duty on the eighth or ninth of May. Q. Where had you been living immediately preceding your employment in this capa-

385 city? A. For several years I had been stopping in the State of Vermont, County of Windham, town of Denniston. Q. Were you employed to come out and take charge of this work before you left Vermont or afterwards? A. I was never employed until after I had been here several days. Q. Did you have any negotiations with any person about coming out here and taking some employment in this capacity? (Objected to.) *Plaintiff*—I want to show who

386 employed him. *The Court*—I don't think it makes any very great difference. *Plaintiff's Counsel*—I want to show the company, if I can. (Objection overruled.) A. I had not in that capacity. I would answer as engineer in charge of construction. Q. I will ask you plainly whether or not you had not some correspondence or negotiation with some person or some company about coming out here and going into the construction of

this road before you left Vermont? A. No, sir. Q. Did you before you reached this country? A. I had correspondence in regard to other roads.
387 *The Court*—That will do. Q. Who employed you to take charge of this construction? A. Mr. Robinson. Q. What office does Mr. Robinson hold in any company that you know of? A. I understand that he is Chief Engineer of the Cañon City and San Juan Railroad Company. Q. To whom do you look for your pay? A. I settle my accounts with Mr. Robinson. Q. You say you are in the employment of the Cañon City and San Juan company, and the Pueblo and Ar-
388 kansas Valley company, how are you in the employment of the Pueblo and Arkansas Valley company in the construction of that road? A. I cannot answer the question; I am ordered to settle accoudts in a way that leads me to that conclusion. Q. Will you please state how you settle these accounts; perhaps the Court then can find out? A. Directed by the Court, I should have to answer the question. *The Court*—Answer unless there is objection, Mr. Greenwood. (Defendant objects to his stating that he has already shown.) (Objeetion overruled.) A. Accounts for the first twenty miles, all expenses are accounted for for the Cañon City and San Juan; beyond that they are for the Pueblo and Arkansas Valley. Q. Do you know from any information you have derived from the officers of the Cañon City and San Juan company, or from your own personal knowledge, where the means come from that is building this twenty miles for the Cañon City and San Juan company? (Objected
399 to—not cross-examination. Objection sustained.)

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Q. You were one of the original incorporators of this company—you, Gen. Palmer and A. C. Hunt? A. Yes, sir. Q. Afterwards you became General Manager of the Denver and Rio Grande railroad? A. General Manager for the Union Contract Company. Q. And who was General Manager of the railroad at that time? A. It was generally considered that the two were one and the same thing, except that the pay all came from the Union Contract Company.

391 Q. Being one and the same thing, when you were General Manager of the Union Contract Company, you were General Manager of the Denver and Rio Grande Railroad? A. My arrangements were that I was to have nothing to do with the operating department of the road, unless there was some quarrel came up between the constructing and operating departments, in which case I could give the necessary orders to make it economical for the two companies. Q. As General Manager

392 of the Union Contract Company, you had charge of surveys, had you not, and had certain control of them? A. Probably more as a Consulting Engineer than anything else. Q. You know of a survey being made through the Grand Cañon in 1871, do you not? A. I know there was one made. Q. Plats were returned to you, were they not? A. I think not. An estimate was returned; the plats, I think, were in the office, and I examined them in the Engineer's office. Q. Returned them to the Chief Engineer? A. I think so. Q.

393 You said in your direct examination that you gave some orders concerning it to Mersereau, and perhaps to McMurtrie. A. I said I didn't know which I gave the orders to. Q. You had a

certain control over that survey, and a certain connection with it, did you not? A. I supposed I had. Q. Suppose so now, don't you? A. Yes. Q. You knew then, at the time the survey was made. Did you order that work in the Cañon?
394 A. I think I did. I don't think the work would have been done if I hadn't ordered it; but to go back to any small thing like that and tax my memory, it is an utter impossibility. Q. The orders that you gave concerning that were in the line of your duty and authority in the company, were they not? A. The general interests of the companies. Q. And in the line of your duty and authority concerning the work? Did you see the work at that time, after it was finished? Did you ever go to look at it? A. No, sir. When did you first see it? A. I could not give the date;
395 since I commenced with the Cañon City and San Juan Company. Q. Some time within the last two or three months? Have you been over the line the entire length of the Cañon since the 19th of April? A. I have been over the entire line, except such points as were triangulated past. Q. Who paid for this work done in this Cañon in 1871? A. I suppose the Union Contract Company. Q. You have been over the line of your company's survey, I mean the Cañon City and San Juan Company, except, you say, those points
396 where you have to triangulate? A. Yes, sir. Q. How close does this line run to this work done in 1871? A. It runs very close to the retaining walls. Q. That is the center line? A. Yes, sir; I don't recollect how far, of course. Q. How far below the road-bed of the line already constructed is the center line of this survey of the Cañon City and

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San Juan Company? A. The center line can not be below the grade line; cannot be below the work done in that place, as it is on a rocky ledge plateau. Q. Does your Cañon City and San Juan
397 line run on that work? A. No, sir; the center line does not; it runs nearer the river. Q. Runs to the left of it going up the river? A. Yes, sir. Q. Is it equally as high as this work is done? A. the centre line, as we call it, is the centre line, no matter how high it is; passes over the point where the line is supposed to be constructed, whether it is one hundred feet above or one hundred feet below. Q. When your work is constructed on that line, if it should be on the line now surveyed, will your road-bed be as high as this road-bed which has been already constructed?
398 A. No, sir, if the height of those walls was the height of their grade line. Q. What is the difference—how much will it be? A. It is in the neighborhood of fifteen or twenty feet; I have not measured it; of course I could not tell. Q. How high above the water, the river, is your line run, if that be constructed? (Objected to—not cross-examination. Our own witnesses testify we take a part of that original grade. We don't deny it.
399 Objection sustained.) Q. On direct examination you say in answer to this question, "Who employed you in '71 and '72, when you were emploped by the Denver and Rio Grande company?" Your answer is, the Union Contract Company paid me. Now, I want to know who employed you? A. Perhaps I had as much to do with employing myself as anybody; it was by general conversation with Gen. Palmer, myself and the other parties—Gov. Hunt was one. Q. They

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were no part of the Union Contract Company? A. Not at the time. Q. Then you were employed
400 actually by the Denver and Rio Grande Company, were you not? A. At the time I commenced with them the Denver and Rio Grande Company, I think, was not organized; I am not positive; all this conversation was in what was called the organization of the corporation. Q. And you continued in the employment of that Contract Company in way you have already specified? A. There was a special arrangement made after that, after we had decided to build the Denver and Rio Grande, and after the Union Contract Company was organized—an agreement between Gen. Palmer and myself. Q. Gen. Palmer was
401 the President of the Denver and Rio Grande Company? A. Yes, sir. Q. You say this work was done in this Cañon for the purpose of holding this Cañon for the Denver and Rio Grande Company to prevent other companies from going in and absorbing it? A. Yes, sir. Q. The survey was made for the purpose of holding it? A. Yes, sir; the survey was. Q. And the work was done for the same purpose? A. Yes, sir. Q. You say at that time there could not have been a road built because they had not raised the money for that purpose?
402. A. In the general acceptance of the term. Q. You were asked when this road was abandoned; you answered you could not say it never had been abandoned? A. The word "abandoned" is so broad that I could not swear to any facts in regard to it; that they went south is a self-evident fact and they called it the main line. Q. You have no knowledge that

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they have ever abandoned that road at all, in the broad sense of the word abandon? A. I presume if they could get money they would build, but not on the original line; I presume not on the
403 original filing. Q. What do you mean by the original filing? A. Through the Poncho Pass. Q. But they go through the Cañon, don't they, on the original filing? A. If they build up the Arkansas River they would be very foolish if they didn't build through the Arkansas Cañon. Q. Is it possible for them to build up the Cañon from Cañon City, without going throug the Cañon? A. Not up the Arkansas River; they can build in the immediate vicinity, in what is called the
404 Arkansas country. Q. You say it is a self-evident fact that they built south and they called it the main line; you say Palmer's explanation of using that route first, was it was a short route, and some other company might get it? A. Yes, sir. Q. Did he at any time and in any of these conversations relating to his building on that route,, say anything to you to the effect that he had given up this Arkansas Cañon route, except for the time being? A. I can only give my impressions from the conversation, the conversation I cannot give, my memory is not sufficient to rec-
405 ollect such. Q. What you have stated about his conversation regarding the building of his road from Pueblo southward, is only an impression; is it not; you don't pretend to give his words? A. I don't. Q. But it is your impression that that was what he meant? A. Yes, sir. Q. I will ask you if you don't know, that the reasons influencing the Company in building southward from Pueblo in '74, was not because it was difficult to

raise money, and it was cheaper to build a given number of miles in that direction than it was to build up through the Grand Cañon? A. I don't
406 think that was the idea, not the general idea as canvassed by General Palmer and myself. Q. From what you knew as an officer of the Company and from what you obtained as information from the other officers of the Company, General Palmer included, do you not know that if they had had sufficient money to enable them to do so they would have pushed both roads at the same time? A. I presume they would; simply a presumption though. I don't know. Q. You
497 may state if it is not much cheaper to build from Pueblo to Cucharas, fifty odd miles, than it would be to build the same distance up the Cañon? A. Cheaper; of course. Q. Would it not cost less to build from Pueblo to El Moro, than it would from Cañon City to the mouth of the South Arkansas? A. That is simply matter of opinion of engineers. I could not answer the question correctly. Q. You are an engineer; are you not able to give an opinion on that? A. Unless the Court directs, I should rather not give it. Q. You were asked about the form of those bonds, and there being permission—in the bonds to
408 change them for stock—in the main line of the road. Those bonds were executed in 1872; were they not? A. I could not tell the time. Q. Were they not executed before the construction of the road from Pueblo to Labran? A. I think they were. Q. Were they not executed in order to secure the money which had been raised for the construction of that work? A. I think they were. Perhaps not so much to secure the money as to

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secure the Central Colorado Improvement Com-
409 pany. Q. Now, at that time, there was no line constructed except from Denver to Pueblo; was there? A. No, sir. Q. There was no line south of Pueblo completed at all? A. No, sir. Q. There was no grading done even, at that time? A. No, sir; not to my knowledge. Q. Then, as a matter of course, that was the main line; was it not. It was the only line they had? A. It was the only line. Q. Then it must have been the main one. At that time had there been any surveys made south of Pueblo, by your Company?
410 A. The country had been examined; I had examined the country years before; the whole country. Q. Examined it before that time for the Kansas Pacific. Hadn't you? A. Yes, sir. Q. You say that it was generally called the road from Pueblo to Labran, was usually called branch. Do you not know that in all the documents and records relating to this piece of road, it was described as a division? A. If the question had been asked me before Weitbrec's evidence, I should
411 have said *branch*. I presume from his evidence, having the papers and all that, recited the word division, and I presume that is the word used. Q. You say there is room for two roads in the Cañon, but you cant't pretend to give any opinion as to the difference in the cost of construction on the two routes? A. I said I would rather not. I could give an opinion, of course.

Re-examination of William H. Greenwood: Q. You say in answer to my question, in speaking o the two routes, if they had had money they would have probably built both roads at the same time.
412 What do you mean by that? A. That they

would have built both roads, one through the Veta Pass into the San Luis Valley, and the other down into old Mexico. Q. And the other through the Poncho Pass to some place? A. I didn't intend to convey that. I think the questions were in regard to building up the Cañon, regardless of Poncho Pass. Q. You didn't intend to be understood up through the Cañon and down through the San Luis Valley? A. I don't think they would build both roads in that direction. Q.
413 They had already made their choice of the route for the road at the time you speak of? A. They had decided, as I understood it, to build south then. Q. The main line south? A. In this same conversation which I had with Gen. Palmer it was left an open question. Q. You speak of bonds being issued to secure the Colorado Central Improvement Company; what is that? A. It is a company organized under the laws of the
414 Territory. Q. For what purpose? A. To raise means to buy lands, and to build two lines of road. Q. What lines? A. To build from Pueblo to the coal banks and Cañon City, and also twenty miles down the Arkansas River. Q. From what point; from Pueblo down? A. Yes, sir. Q. Was this road you speak of, from Pueblo to Cañon City, built by the Colorado Central Improvement Company? A. No, sir. Q. Did they furnish the means to build it? A. That was my understanding, that they did furnish the means, and received a million and forty thousand in bonds for the construction. Q. That road was
415 not constructed by the Contract Company? A. Constructed by the Union Contract Company, with the funds of the Colorado Central Improve-

ment Company. (Objected to as not re examination.)

Townshend S. Brandegee, sworn: Q. What is your business or profession? A. Civil engineer. Q. State where you are employed, if anywhere at present, and by whom? A. I have been working up the Cañon of the Arkansas, in one of Mr. Robinson's engineering parties. Q. State under
416 what circumstances you first knew the Grand Cañon of the Arkansas. A. I have been through there on the ice as far back as 1872—'71. Q. Seventy-one and two? A. Yes, sir. Q. Under what circumstances, and with whom, if anybody? A. I just went through on the ice to go through. I don't know who was with me. Q. State whether you were ever connected with the survey of that Cañon. A. I was with Mr. Holbrook, in February, 1877, I think. Q. Go on and state how
417 you made the survey, what was done, and for what company it was made. A. It was made for the Cañon City and San Juan Company, and we run a line all through the Cañon, putting stakes every fifty feet, and putting the curvature in on the ground, except in the Royal Gorge, where it could not very well be done. Q. You may state what kind of a survey you made through the Royal Gorge. A. It was an angle line through there, with stakes wherever they could be set—that is, upon the rocks—and the rest of the way it was upon the ice. Q. State whether it was a
418 correct and accurate survey. A. Yes, sir. Q. For the location of a road? A. Yes, sir; as good as could be made. Q. State whether or not that survey was sufficiently complete to draft a plat and profile of a road. A. Yes, sir, it was.

Q. You may give the date of that, as near as you can, the date of that survey. A. It was in the latter part of February, 1877, I think. Q. State whether or not the Grand Cañon of the Arkansas at that time was in the public lands of the United
419 States. A. Yes, sir. (Objected to; not a question to be proved by parol. *The Court*—My impression is, it is conceded by both parties; I don't see why it should be questioned here.) Q. State whether or not that location was made to conform to the lines of the public survey. A. Well, it was, as near as could be at that time. Q. What was the condition of the public survey at that time? A. The exteriors of that township were run, but the sub-division lines had not been run.
420 Q. State whether or not it was properly connected with the exterior lines. A. Yes, sir. Q. State if you know whether or not that township has been sectionized since. A. The section lines or sub-divisional lines were run last November and December. Q. State if you know who did it. A. I did it. Q. State if you know whether the plat or map of that road is correct in regard to the exterior lines of that township and the sub-division lines? (Objected to as leading; objection overruled.) A. Well, the sub-divisional lines were not run at the time of
421 the survey, but it was connected with the corners, and the exterior lines correctly. Q. I will ask you if you have ever seen any old work in the upper part of the Cañon or at any point in the Cañon? A. Yes; we saw a few old stakes along through the Cañon, and some grading done. Q. Where did you see stakes—how many? A. At different points along through the Cañon—half a

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dozen or more—not very many. Q. You say you
422 saw grading just above what is known as the Royal Gorge—what was its extent? A. About two or three hundred feet long and across some small gulches that were filled up, so that this two hundred feet was on a grade of some sort. Q. Do you know who did the work? A. Only by hearsay; I didn't see it done. Q. State whether you assisted in preparing a plat and profile of that railroad route? A. Only in drawing it; I assisted in making out the notes and calculations, and so on. Q. Who made the map? A. Mr. Holbrook.
423 Q. In your presence? A. I saw him making it; he used some of my instruments in making it. Q. State whether or not it is a correct map? A. Yes, sir; I suppose so; it was made from the notes. Q. Were you familiar with the Grand Cañon? A. Yes, sir. Q. Through its entire length? A. Yes, sir. Q. State whether or not there is room at all points in that Cañon and the Royal Gorge for the construction of two lines of railway? A. Yes, sir. Q. If you have made any calculation
424 in regard to the comparative cost or the difference in cost of construction? A. No, sir. Q. You could not give any definite idea of the difference? A. No, sir. Q. Look at that map (exhibit;) state whether that is the map you referred to in your testimony? A. Yes, sir; it looks like it. Q. Examine and see if it is? A. Yes, sir. Q. State whether that map is properly connected with the exterior lines of the township? A. Yes, sir. Q. State what those dotted lines show within the township? A. Those represent where the sec-
425 tion lines would probably come when it shall be sub-divided. Q. Are those correctly put on? A.

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Yes, sir; that is as far as the drawing is concerned on the plat.

Cross-Examination of Brandegee: Q. Can you fix with any certainty the day of the commencement of your survey with Holbrook? A. It was in February, and I think near the end of February; I don't remember the date. Q. Have nothing by which you can fix the exact date? A.
526 No, sir. Q. How long were you engaged in making that survey? A. Well, it was about two months. Q. How farup did you go? A. We meant to go twenty miles from Cañon City; I think we went about twenty miles from the depot; have no recollection, though. Q. You say in going along you found some stakes, a half dozen; did you run your line on those half dozen; did your line coincide with those stakes where you found them? A. Well, we happen to see them—not exactly—no, sir; could not tell very well
427 where the line did go from a single stake; it was probably one side or the other of them. Q. When you got into the Royal Gorge, where did you put your stakes there? A. They were put up on the rocks wherever they could be—that is a very small part of the gorge. Q. What proportion of the gorge could you find place to stick stakes? A. I don't remember as to that, certainly. Q. The other stakes were stuck in the ice? A. Some of them put in the ice—yes, sir; in some
428 places the walls were perpendicular; in such places they were always put in the ice. Q. Did you find stakes in the Royal Gorge that had been stuck there before? A. No, sir; didn't see one. Q. In making your survey did you see where any work had been done? A.

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Yes, sir. Q. Is your line run below or above that work? A. I know stakes were stuck on the grade at that time, on that grading; that is, Mr. Holbrook's. (Question by defendant's counsel: You mean the original survey?) A.
129 Stakes were put on that; the grading would cover eight or ten feet in places, perhaps. Q. How much above the water is that work? A. Forty or fifty feet; some where along there. Q. Your stakes, a good many of them, were set down on the river on the ice? A. No; they were up on the grading at that point. Q. Some of them were set on the ice? A Yes, sir. Q. They must have been some forty feet below your line; were they not? A. No, sir; probably not more than ten or fifteen feet—the grade line, you mean. Q. Yes. If you construct your railroad on the
430 line you then surved, how much above the stakes that you set in the ice, will your line be? A. Well, of course, it would vary in different places; it would make a difference where the grade was established from those stakes; those stakes were used in locating the line. Q. How far generally above? A. That is done on the profile, generally from ten to fifteen feet above high water. Q. How much above low water? A. It would not be more than four feet generally above high water, ten or
431 fifteen above low water, perhaps. Q. You set your stakes on the ice, you say, because you could not find any place, any earth to set them. Is there any place along that cañon and that gorge, where you can find earth enough to set a stake? A. Yes, sir. Q. Could you find it anywhere through the cañon within a hundred feet of another stake, a place to set a stake? A. No, sir.

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I think there are places that it can be done for some distance. Q. Now, failing to find earth to put your stakes in, could you not, just as well as not, set
432 your stakes and held them in place by loose rocks? (Objected to.) A. Not on perpendicular rocks. Q. How much of that sixty-six hundred feet in the Royal Gorge is perpendicular rock, you could not find a place to fasten a stake? A. I don't know how much of it is. Q. For whom were you making this survey? A. Well; I understood at the time that it was the Cañon City and San Juan Company; that was common talk amongst us there on the survey. Q. Who paid
433 you? A. Well; I was paid directly from Mr. Holbrook. Q. Money? A. Check on the bank, and I think signed a pay-roll that was headed Cañon City and San Juan Railway Company. I am pretty certain of it; I am not positive. Q. About what time did you get your pay? (Objected to.) Q. As to this map, are the sub-divisional lines, as you call them, connected with your survey on that map? A. They could not have been, because the survey was made before the sub-divisional lines. Q. It has never been done since? A, I don't know. Q. Unless you have sub-divis-
434 ional lines at the time you make a survey of this kind, is it possible to make an accurate survey and plat, so that when you come to complete the work, the line, you can find where they come? A. You can do it as well as you can at that time; you can't connect it with the lines, because the lines aren't there. Q. Without you have the lines, then, can you depend on the certainty of your
435 survey? A. The survey is all right; it doesn't make any difference with the survey—the lines.

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Q. Does it make any difference with the work? A. It doesn't make any difference with the work, as I see. Q. Are you assisting in the construction of this work now? A. I am up in the cañon at present; have been. Q. On the engineer corps? A. Yes, sir. Q. How did you find that the line you surveyed and platted agrees with the line the company is now pursuing in constructing this work? A. I have only been on that part from Cañon City to the Grand Cañon. Q. You know nothing about it inside of the cañon? A. No,
436 sir; I have not been inside of the cañon, that is, the gorge, this summer. Q. Since you have subdivided those sections, are your lines on that map the same with reference to those sub divisional lines that they were before you made the survey of the section? A. I could not tell without running it on the ground. Q. That you never did? A. No, sir. Q. You don't know how they agree when you come to make a plat of them? A. No, sir; of course not. Q. Isn't it true that in the survey of government land, sub-dividing the sections for land-office purposes, the surveyor is allowed a certain number of feet to go on, so that one of these quarter sections which you have platted here may fall in another without making a portion of that survey? (Objected to, and objection sustained.) *The Court*—You may ask him whether the lines fall in a particular place according to the exterior lines,—whether they must of necessity; what he is allowed in the Land Office has nothing to do with it. Q. That plat is made
438 before a survey, and they are merely imaginary lines, are they not? A. They represent where lines would probably come; they are approxi-

mate lines. Q. When you come to make a survey for the government for land-office purposes, the lines you may run as a surveyor may not agree with those lines, may they? (Objected to; objection overruled.) A. They would differ very little; they would not probably be exactly that. Q. What do you mean by very little—a few feet? A. They ought not to more than that; take the
439 whole township through, it would not amount to anything. Where it is excess on one mile, it would be deficiency on another. It is very little; that is corrected on the next mile. Q. That don't correct the deficiency as to the deficient quarter section. A. Well, of course, it is very little on each mile; it is averaged through. Q. That is, if it is averaged. A. The error allowed is about sixty feet; generally it is very much less than that. Q. Don't it very frequently occur in government surveys that a township is four to six hundred feet shorter than it ought to be? A. Well, if it
440 is noted in the notes, that would show on the plat. Q. Doesn't it occur very frequently? (Objected to.) A. No, sir.

Re-examination of Brandegee: Q. State whether that township had ever been sub-divided prior to last year. A. No, sir. Q. It was not sub-divided in '71 and '72? A. No, sir. Q. I understood you to say on your direct examination that those dotted lines, section lines, were only put there as suppositious lines, where it was supposed they would occur. A. Yes, sir. Q. Would the varia-
441 tion of the sectional lines of the actual survey from those suppositious lines in any way affect the location of your road in the Grand Cañon? A. No, sir. Q. Now, in regard to the stakes on the

ice there. State whether or not stakes set up on the ice would or would not be as correct a location as it would the same distance if the line were on the precipice? A. Yes, sir; it would be just as efficient for making the location. Q. State
442 whether that location was a correct location. A. I suppose it was; yes, sir.

Charles E. Gast, Esq., sworn: Q. You may state what your business or profession is. A. Practicing attorney. Q. State if you know the Cañon City and San Juan Railway Company. A. I do. Q. State if you have had any official connection with it. A. As the attorney of the Cañon City and San Juan Company, I have procured by the Secretary of Interior the approval of that plat of right of way (Exhibit No. 1); that I under-
443 stand to be a copy of it. Q. State what you did. A. The map was furnished to me by Chief Engineer Robinson; by Mr. Holbrook, I should say. I had prepared at that time a certified copy of the articles of incorporation of the company; also a certified copy of the general incorporation act under which the company was incorporated, and the certificate by the president of the company as to the organization, who the officers were,—which are the proofs required to be made by act of Congress and the regulations of the Land Depart-
444 ment; filed the plat, together with the proofs, with the Register and Receiver of the local Land Office at Pueblo, and they transmitted the same in the usual course of business to the Commissioner of the General Land Office. Q. State what evidence you had, if any, of its having reached the Secretary of the Interior. A. Some months afterwards I was notified by the— (Ob-

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jected to, not competent; objection sustained.)

445 *The Court*—Plat recorded in office of Secretary may be transcribed, and that by act of Congress is evidence of record.

Verbal agreement of attorneys spoken of, etc.

Aaron A. Robinson, sworn: Q. What is your business? A. Civil engineer. Q. By whom are you employed at the present time? A. Employed by the Cañon City and San Juan Railway, one corporation. Q. In what are that company engaged, if anything? A. Engaged at the present time in the construciion of a road westward from

446 Cañon City. State whether or not they are constructing a road in what is known as the Grand Cañon of the Arkansas. A. Yes, sir; that is the line adopted. Q. State whether you are familiar with that Cañon. A. I am. Q. State whether at any point in that Cañon there is not sufficient room for the construction of two roads. A. I think there is room for the construction. Q. Have you ever made an estimate of the difference of cost of construction of the two roads, allowing them to be built upon the same grade

447 and nearly the same curvatures? A. Upon opposite sides of the Cañon, do you mean? I have not. Q. You have made no careful estimate. Have you made any estimate whatever? A. Simply by observation without doing any instrumental work. Q. From your knowledge of the Cañon, what would be the difference in the cost of the construction of the two roads? A. It would depend on the grades and curves. Q. On the grades and curvatures on which the Cañon City and San

448 Juan Company is building its road, with maximum grades of seventy-five feet to the mile, and curves

with a radius of three hundred and eighty feet? A. I should say the difference would be in the neighborhood of from fifty to seventy five thousand dollars—that is putting the same grades and curvatures on opposite sides of the Cañon. Q. Would the difference in the cost of construction exceed the difference in the estimate you have made? A. That is my opinion as to the difference in cost; it cannot only be determined by an actual survey. Q. For what distance, then, would
449 there be difficulty in putting in two roads? A. The difficulty would be overcome by the difference in expense at all points. Q. On a former occasion you and others testified before the Court that there was a certain proportion of that road in which two lines could not be constructed; state whether you have had occasion very recently to examine it? A. I have recently been through the Cañon, and upon certain work we have done in encroaching upon the river, I have changed
450 my views; the reason of the change is we can encroach upon the river by the use of rock to build a roadway; there is room at all points; the narrowest place is about forty feet; that is room for two tracks. Q. From recent observation and survey you have had reason to change your former opinion? A. Yes, sir; and it is based upon the fact that we can encroach upon the river in making a roadway, and find it does not wash away.

Cross-Examination of Aaron A. Robinson: Q. You say you are now connected with the Cañon City and San Juan Railway Company as Chief Engineer? A. Yes, sir. Q. When were you so
451 employed? A. On the 19th day of April. Q. What time in the day? A. I could not tell you—

sometime between seven and eight o'clock, I should say, in the evening. Q. How long after I and Mr. Weitbrec met you on the ditch below the flume? (Objected to as immaterial; objection sustained.) Q. Who employed you as engineer of this company? A. I was appointed as engineer by the directors. Q. Any consultation with you before hand? A. Yes, sir. Q By whose advice was it done—yours or theirs? (Objected
452 to and objection overruled. A. I could not tell you. Q. Now, sir, how much do they pay you, if anything? (Objected to as immaterial and not cross-examination; objection sustained.) Q. What are your duties as Chief Engineer? A. I am in charge of the construction of the road. Q. Have you anything to do with purchasing supplies for the construction, material for the construction, such as ties, bridge timber—things of that kind? A. I make the contracts for the work;
453 yes, sir. Q. Have you any control of that? A. No, sir; I am under orders of the General Manager. Q. Who is the General Manager? A. William B. Strong. Q. When was he appointed General Manager? (Objected to as not cross-examination; objection sustained.) Q. What control, if any, has the Board of Directors of the Cañon City and San Juan Company over your actions as Chief Engineer? A. I would have to refer you to the General Man-
454 ager for that; I am acting under his orders; he is my superior officer; I get my orders from him; I was appointed directly by the company; as I understand it, I am responsible to my superior officers. Q. Do you recognize any responsibility to the Board of Directors of the Cañon City and

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San Juan Railway Company? (Objected to and objection overruled.) A. My responsibility or any orders—everything relating to that company, is through the General Manager; I don't know
455 anything further than that. Q. You don't know the directors at all in your business transactions? A. I know them—yes, sir. Q. In your business transactions? A. No, sir. Q. Do you hold any other position besides a position in that company? A. Yes, sir. Q. What is it? A. I am Chief Engineer of several railroad corporations. Q. What are they? (Objected to, as immaterial. Objection overruled.) A. Pueblo and Arkansas Valley Railroad Company, New Mexico and Southern Pacific Railroad Company, Wichita and Southwestern Railroad Company, Kansas, Topeka and Western
456 Railroad Company, Pleasant Valley and De Soto Railroad Company, Atchison, Topeka and Santa Fé Railroad Company. I believe that is all at this time. Q. Out of all those innumerable duties, you give your whole time to the Cañon City and San Juan? A. No, sir. Q. Who pays off these hands, Mr. Robinson, that do the work on that road? (Objected to, not cross-examination.) Q. I asked what, if anything, he has to do with the payment of his hands? (Objected to, and objection sustained.) *The Court*—The enquiry to which counsel directed his question was as to whether two roads could be constructed in this
457 cañon. Q. I will ask you whether or not, at any time since you have been appointed; I will say since the last day of April last; you have, in constructing the road through the Grand Cañon, purported to be or held yourself out as acting for

any other road than the Cañon City and San Juan Company? (Objected to, as immaterial and not cross-examination.) A. I don't know whether I have or or not; not to my recollection. Q. I will ask you if you have not since the 19th day of April, in dealing with persons for bridge tim-
458 ber and ties to be used in that cañon, dealt with them as the Chief Engineer of the Pueblo and Arkansas Valley road? A. I had no dealings with any one in reference to that subject, no contracts made, when they are made, they will be made in the name of the Cañon City and San Juan Company. I will state in connection with that question that the Atchison, Topeka and Santa Fé road is better known than these local organizations; perhaps at some time I may have mentioned their name as being a corporation better
459 known. All contracts are made in the name of the Cañon City and San Juan. (Handed newspaper.) Q. Is that your proposal? A. Yes, sir. Q. That was since you were made Chief Engineer of this road? A. Yes, sir. Q. What do you call yourself there? A. Chief Engineer of the Pueblo and Arkansas Valley Railroad, according to this notice. Q. Those ties are to be used in the Grand Cañon? A. No, sir. (Advertisement referred to, offered in evidence, entitled "Proposals.") Q. I will ask you if, in the construction of this road
490 through the Grand Cañon of the Arkansas, in which you are now employed, you are not acting for some other company than the Cañon City and San Juan Company? A. In the construction of the road through the Grand Cañon; no, sir; no other corporation; not in that connection. Q. Can you explain what you made that publication

for? A. I don't know as it is necessary. Q. I don't know that it is either. *The Court*—I don't think it will need any explanation. Q. You say that you had one swear at this case as to the char-

461 acter of this cañon, and you have examined it more thoroughly, and have changed your opinion? A. With reference to the construction of the two roads; yes, sir. Q. And now your opinion is that the second choice of routes through that cañon will involve an expense of fifty thousand or seventy-five thousand dollars more than it would cost to build the road on the first choice of routes? A. That is an opinion. I hadn't made any careful estimates in regard to it at all.

462 Q. Don't you base this opinion upon the supposition that each road is to keep on one side of the river all the way; but if the company has the first choice so as to cross the river back and forth; then is not the difference between the cost of first and second choice of routes, a great deal more? A. No, sir; not in my opinion. Q. What proportion, or what part of this cañon does this additional expense cover the Royal Gorge; or do you estimate it from the mouth of the Cañon to the head? A. From the mouth of the Cañon

463 to the head. Q. When you testified before in this case as to the impracticability of the two roads through that gorge, had you been entirely through the gorge? A. I had not been entirely through it; that is one reason the Cañon is a little different from what I had been led to suppose it was from descriptions. It is very difficult to describe the gorge exactly. Q. What proportion had you been through of the gorge when you testified before? A. I could not give you the dis-

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464 tance; about two thousand feet out of sixty-six hundred. Q. You testified then by guess? A. No, sir, not by guess. Q You testified then without seeing it? A. I testified on the reports of subordinate engineers. Q. Has the work on the road reached the gorge at this time? (Objected to, not cross-examination; objection sustained.) Q. Had you any connection with this company at all until you were appointed Chief
465 Engineer? A. None whatever. Q. How long had you known this company as a company? How long had you known its directors when you were appointed Chief Engineer? (Objected to; objection sustained.) Q. How did you happen to be at Cañon on the 19th of April last, and for what purpose did you go there? (Objected to; objection overruled.) A. I happened to be at Pueblo when the train for Cañon City left; I got on to it and left there. Q. Had no business there? A. My business was to go to take charge of the work of construction in the Cañon. Q. Hadn't been appointed then? A. No, sir. Q. Whose engineer was you acting as then? A. I have
466 already stated. Q. All those companies you have stated? A. Yes, sir, I represented. Q. Under whose immediate orders? A. I was my own man that day, acting under my own advice going up there. I had known a good while the construction was to be begun some day. I supposed I would have charge of it when it did begin. Q. On the 19th of April, when you started to go to Cañon, you went on your own motion, without any directions from any other company, and without any invitation from the Cañon City and San Juan Company. (Objected

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to, and objection sustained.) Q. I will ask you
467 if you didn't have any charge and supervision of that Cañon before you were appointed Chief Engineer of this road? (Objected to, and objection sustained.

Re-examination of Aaron A. Robinson: Q. In your answer to Mr. Macon, you speak of crossing the river back and forth through the Grand Cañon in the construction of the road. State whether your line as located crosses the river backwards and forwards? A. It crosses the river twice. Q.
468 Only twice? A. In the Grand Cañon.

TUESDAY, JULY 23D, 1878, 2 P. M.

Mr. Macon, for plaintiff,

Offers in evidence certificate of incorporation of D. & R. G. R. W. Co. ("It is in the files already.")

Offers in evidence act of Congress of June 8, 1872.

Offers in evidence act of March 3, 1875, entitled "An act to amend," etc.

Offers amendatory act of March 5, 1875.

Mr. Reed—We will make no objection to them; we have admitted them all in our pleadings.

Mr. Reed, for defendant,

Offers in evidence the letters identified this
469 morning,—one a letter from Gen. Palmer and two letters of Wm. S. Jackson; marked by clerk, filed in case. Letters as follows:

Colo. Springs, March 18, '73—W. J. Palmer.
May 17, '74—Wm. S. Jackson.
March 31, 73—W. S. Jackson.

TESTIMONY FOR DEFENDANT.

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Defendant recalled *B. F. Rockafellow:* Q. Where did you reside in 1873 and '4? A. Cañon City? Q. At that time, commencing in 1873, how far had the Union Contract Company, or the Denver and Rio Grande railroad completed a road to your place? A. They completed a road in October, 1872, to Labran or the coal banks.
470 Q. What distance? A. About eight or nine miles from Cañon City to Labran. Q. State whether any action was taken upon the part of the inhabitants of Cañon City to have a road completed to that place? A. Yes, sir; efforts were made. Q. At what time? A. About March, 1873, a committee of citizens met and appointed a committee to negotiate with Gen. Palmer, President of the Denver and Rio Grande road. Q. Who composed that committee? A. I am not positive who all the members were; I was one of
471 them, however. Q. State if, as a member of that committee, you had any communication, verbal or otherwise, with the officers of that company in regard to the extension of the road? A. I had several interviews, I think, but one in particular, about March 18th, with Gen. Palmer. Q. State what, if anything, was said at that time in regard to the intention or any intention of the company to
472 prosecute work in that direction further over their railway, by Mr. Palmer, as President of the Denver and Rio Grande Railway Company? (Objected to; objection overruled. A. Our conversation was about the amonnt that he demanded of the people of Fremont county, and he insisted on their giving—furnishing him bonds or securities—one hundred thousand dollars as compensation for extending. I will have to explain this in order to

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give you an intelligent answer. We tried to get it changed to seventy-five thousand dollars, re-
473 duced to seventy-five thousand dollars, and his answer was the reason he asked so much or must have that amount at least, was because they could secure all the business at Labran as well as to extend it to Cañon City. I say this is my recollection; I won't state the exact words. Q. State whether it was substantially the result? A. Yes, sir. Q. Now answer the former question, and state what he said, if anything, in regard to his intention to prosecute the construction of a road further in that direction without assistance from Cañon City? [A. *Well, because they were contem-*
474 *plating building in another direction—building southward.* Objection to answer as irresponsive, and motion to strike out. *The Court*—Strike it out.] Q. Without the assistance of Cañon City, what did he say in regard to the intention or non-intention of constructing a road farther than Labran? A. My impression was—(objected to.) A. The result of the conversation was that they contemplated building south, not further west, and if they built up to Cañon City they must have pay for it.
475 Q. Now state what amount he required, or the company required through him to continue that road to Cañon City, and what the distance was; I believe you have stated the distance was eight miles? A. He required that we should secure fifty thousand dollars of bonds that had been then voted by the county, and vote an additional fifty thousand dollars in bonds. Q. State what was done? A. I believe we attempted to vote the other fifty thousand dollars and failed. Q. Then, what, if any, negotiations took place, and what

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476 was the result? A. Then we voted bonds of the town of Cañon City and deeded them real estate. Q. What was the amount of the bonds voted by Cañon City? A. Fifty thousand dollars. Q. What was the value of the real estate, estimated value at that time of the real estate? A. Well, they called it, they estimated it at fifty thousand dollars. Q. Who made that estimate—did the Denver and Rio Grande, through its officers do it? A. They took it in at the valua-

477 tion different parties placed on it. Q. What was the valuation they made,—fifty thousand dollars? A. I don't know whether they did. Q. State whether any lands were deeded them? A. Yes, sir; there were lands deeded them, and lots. Q. To the extent agreed upon? A. I so understood it; I am not positive. Q. At what time were the fifty thousand county bonds of Fremont county voted, that you speak of? A. Well; I don't remember; I think in 1871. Q. What was the amount of that bonded indebtedness created, for the purpose of getting a road

478 there? A. Fifty thousand dollars. Q. The bonds that he referred to in this interview; state whether this subsequent appropriation of fifty thousand and land was in addition to that? A. On account of our failing to get the county bonds, the other bonds were voted; not in addition to the county bonds; the lands were to be redeeded in case we secured the county bonds which had been voted. No county bonds were secured, and they held the lands. Q. State as near as you can the language used by General Palmer in regard to not con-

479 structing a road any farther? A. I could not state the language; could state the impression

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that I got, and nearly our whole public, I think. Q. What do you mean by the impression? A. The result of the conference. Q. And that you have already stated; have you? A. I have stated nearly as possible. (Handed letter of Gen. Palmer.) Q. State if you received that letter? A. I did. Q. In what capacity did you receive it? A. As member of that committee—the committee of
480 the citizens of Cañon City. Q. Did you receive it about the date? A. I think I received it the next day, or before I left Colorado Springs that night. Q. Was that written during the time that you, as that committee of conference, was conferring with General Palmer and the officers of the Denver & Rio Grande Railway Company in regard to extending the road to Cañon City? A. I think it was right away after the conference. (Handed letters.) Q. Look at these and see if these
481 were written at the time they bear date and were received, and whether they refer to the same matter? A. This is another committee, or other parties; this one of Mr. Jackson's. Q. Did you know anything about that at the time? A. Yes, sir. Q. Was it written in regard to the same subjec matter as the last one I referred to—the last one of Mr. Jackson's? A. The first one was about this same matter of the first interview of March 17th, 1873. Q. Then you state as the result of your negotiations with the Denver & Rio
482 Grande Company through its President that they declined to build further, and expressed their intention not to build further unless they were paid for it? A. That is the way I understood, sir.

Cross-examination of B. F. Rockafellow: Q. The fifty thousand dollars bonds first voted by the

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county, were voted in 1871; were they not? A. I think those were not the first bonds that Fremont county voted; I am not positive as to the
483 date of the first issue. I am inclined to think the fifty thousand were voted in 1871. Q. Those were the first bonds ever voted by that county for any purpose; were they not? A. I am not positive as to that, whether that is the first vote we had or not. Q. Do you know where the railroad was completed to at that time? A. No, sir; I don't remember; I think to Pueblo. Q. Don't you remember the object in voting those bonds was to prevent the road from going to Pueblo—to cut
484 off Pueblo. Don't you know that I and you and a few others put that thing in motion in order to induce them to do that? A. Our intention was to get the roads with the bonds. Q. Had Palmer, Greenwood or Jackson ever had any correspondence or communication with us in any way in regard to voting the bonds? A. I think we got up the first bonds on our own motion. Q. Now, then, this matter you have referred to, or this proposition and the voting of the hundred thousand dollars,
485 or the voting of the additional fifty thousand and giving those we voted in 1871, was made in 1873, was it not? A. Yes, sir; some time in March, '73. Q. Upon that we proceeded to petition the County Commissioners that a vote be had, did we not? A. I think we did. A. And that vote came off in June? A. I don't remember the date that it came off. Q. In which we voted for a proposition to issue one hundred thousand dollars, with a condition that the first fifty thousand voted in '71 should not be called for. Don't you remember that? A. Possibly that was the way.

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486 Q. So the first fifty were dropped in that proposition, and we failed to carry that proposition by a majority sufficient? (Objected to as not cross-examination.) Q. Then that proposition of Gen. Palmer's you speak of, made in March, '73, was not carried out, was it? A. No, sir. Q. The work on the road remained suspended? A. Remained at Labran until the subsequent proposition of Mr. Jackson. Q. Until June, 1874? A. I think it was May or June. Q. Then the whole

487 thing was re-organized, was it not? A. Mr. Jackson made another proposition. Q. Palmer made no proposition at all on the second, did he? A. The last time? No, sir; I think Mr. Jackson was acting Vice President, managing. Q. You had a conversation in the spring of '73 with Gen. Palmer, in which you inferred from what he said that he had abandoned for all time the intention of building westward from Labran, and particularly from Cañon? A. I inferred they were going to build southward, by another route, as he was

488 then contemplating going to Mexico, and there was some talk about their line to El Paso. Q. On a visit? A. No; he was going in connection with railroad business. Q. He was going down personally, himself. You don't mean to say he was going to build his road down there? A. No, sir; I mean he was going there on railroad business, and they were contemplating building their

489 main line to El Paso, and gave us to understand they were surveying another line. Q. At that time they hadn't a shoveler on the line south. Did you know they had made a survey in March, '73, down there? A. That is the way I understood it, that they were surveying at that time. Q.

I think Mr. Mersereau was surveying then in the Sangre de Cristo Pass? A. That is my recollection. Q. Have you any knowledge of it yourself? A. Nothing except a general impression I have. Q. Can you recollect one passage in Gen.
490 Palmer's conversation upon which you based your conclusion that they had abandoned that route, and were going to seek another route for their road to Mexico? A. Well, the main thing was, that they talked about a branch to the iron mines, etc., and there was no conversation relative to an extension up the river, except that they were contemplating building by another route, and consequently Cañon must pay them. Q. Don't you remember distinctly, in the spring of
491 '73, either April or May, that this company, the D. & R. G. Company, put a corps of engineers looking for a route westward through Oak Creek, and that corps, with R. N. Clark as one, went through Oak Creek, went into the valley, and from the valley on towards Texas Creek, looking for a route westward? (Objected to; objection overruled.) A. I know they made an examination of Hardscrabble and Oak Creek Passes. My recollection is that they were trying to get off through the Moscow Pass; that way—not by the way of Texas Creek. Q. You don't know, then, they went on towards Texas Creek
492 to the foot of the Grand Cañon? A. I think they did not; I think they went towards Moscow and Music Pass. Q. That was the very time you say from conversations with Palmer you conclude they were not— A. No; I say at the time they made those examinations of Oak Creek and Hardscrabble Passes, I think they surveyed in that

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direction; what that date was I don't remember. Q. Don't you remember it was the very time we were in Wet Mountain valley preparing for this vote;
493 don't you know it was the time I and you were over in that valley and they surveyed some of the line, and young Greenwood was with you? A. I don't remember; I know they made an examination of Oak Creek more than once, and reported it impracticable. A. Yes, sir. Q. You cannot now repeat one word or sentence of Gen. Palmer's upon which you concluded that they had abandoned the road beyond Cañon City? A. Well, I remember distinctly relative to the seventy-five thousand dollars that I tried to get him to consent
449 first to receive fifty thousand, and then when he would not do that to get it reduced to seventy-five thousand, and my recollection is that Gen. Palmer was quite emphatic that we must raise the full hundred thousand, because they could secure that business at Labran as well as by building up to Cañon City; they were contemplating building in another direction. Q. Didn't what Gen. Palmer said about getting business from Labran, as well as from Cañon City, apply to the then condition of things; didn't he invariably, in speaking of this, say at this time there is no necessity of
496 building? A. I think he claimed the business at Cañon City would not pay for the road; he claimed he could secure the business at Labran. Q. Well, he could, couldn't he? A. Not as much, we claimed. Q. No, because we expected the town to become about as large as New York City, but it didn't. This fifty thousand dollars we afterward voted on an entirely different arrangement, carried out in the summer of 1874? A. I think

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so. Q. And turned over to the company, and
496 they built the road according to contract? A. I think so. Q. These bonds have been since repudiated? A. They levy the interest. Q. Do they pay it? A. Some pay it; some don't.

Re-examination of B. F. Rockafellow: Q. Where is that Moscow Pass you talk about? A. I believe it is the first pass north of the Sangre de Cristo; I think it is the first. Q. To reach Moscow Pass on that survey—the Oak Creek survey—would it go through the Grand Cañon of the Arkansas? A. No, sir; skirt along the Wet Mountain Valley.

Here the defendant rested its case, asking to reserve the right to call the Register of the local
497 land office to-morrow, Wednesday, the 24th in regard to the approval of this plat, or afterwards to furnish proof from the general department.

PLAINTIFF REBUTTING.

The plaintiff called in rebuttal.

B. F. ROCKAFELLOW.

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Ques. I will ask you whether or not during the month of April last you were corresponding with the Pueblo Chieftain ?

Ans. Yes, sir.

Ques. What was—what is your *nom de plume* ? Objected to.

Plaintiff's Counsel. I propose to show what
498 Mr. Rockafellow said about who was building this railroad at that time. This was a question not brought to my mind until Mr. Rockafellow was dismissed from the stand yesterday.

The Court. I suppose it is not claimed he wrote these Articles as an officer of the road.

Plaintiff's Counsel. I don't suppose he did. I think he then had all the information as an individual that he could have as an officer.

The Court. Why not ask him directly what statements he has made ? I am at a loss to know whether it is impeachment ——

499 Ques. Did you, or not, make this statement on April 22nd, 1878 : "The situation grows more exciting each moment. The Atchison, Topeka and Santa Fé have on the ground at the present four hundred men and more coming. Wagons are continually going to the front, packed with men like sardines in a box, armed with shovels,

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picks, etc., etc. De Remer and men took to the river, and Holbrook, who having recently surveyed the cañon and was better posted, took to the mountains, and came out ahead, as usual for the Atchison, Topeka and Santa Fé. The whole country is in a hurrah of excitement for
500 the Banana line"? Objected to as an attempt to attack the credibility of their own witness. If admissible at all, it would not be as against the corporation. Objection overruled.

Ans. Not as an officer of the Cañon City and San Juan Company.

Ques. Did you make it as a man?

Ans. I made it as an anonymous correspondent, to tickle the public fancy.

Ques. Yes, that is all right—tickled—no question about that?

Ques. Did you make the following statement —dated April 27th, Cañon City:

"No arrests were made. The Atchison, Topeka
501 and Santa Fe men are not permitted to have fire arms, having positive orders not to make forcible resistance, unless obliged by an armed body of men." "W. B. Kean, train dispatcher of the Denver and Rio Grande Railway, who represents himself as being a deputy United States Marshal, acting under authority of the United States Court, was at the head of a party who drove out and took possession of provisions of the Atchison, Topeka and Santa Fe party, last night"

Witness. I refuse to answer the last on the
502 ground that if I was it would criminate myself in an action of—as to the first one, I will say these first questions, that these articles were written—

Ques. All I want to know is, whether you

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made that statement—did you or not make that statement?

Ans. I made that first statement. I object to answering relative to the last.

Plaintiff's Counsel. I insist on an answer to the last your Honor.

The Court. Let me see what it is, sir, (referring to article in newspaper) I don't see anything in that to involve a criminal charge—I don't see why you should object on that ground.

503 *Witness.* I wrote that, as I did those other newspaper articles, mentioned the Atchison, Topeka and Santa Fe, knowing it was the Cañon City and San Juan Company, at the same time that was building the road over that line, that the Atchison, Topeka and Santa Fe Company were not doing the work, but, as I said, they were made to tickle the public fancy, and I put it in, Banana line, etc., as an anonymous newspaper correspondent.

504 Ques. What line is meant by the Banana line?

Ans. It is generally understood in our section of country to be the Atchison, Topeka and Santa Fé.

Ques. Can you tell why it would not tickle the public fancy to use the name Pueblo and Arkansas Valley road?

Ans. Because that is a very popular line, a long line of road, and our people were anxious to get a connection with it. Objection by defendants.

The plaintiff called in rebuttal, McMurtrie,
505 who had been sworn, and who further testified as follows:

Ques. You have already testified you made the survey through the Grand Cañon and the

FOLIO

Royal Gorge. I will ask you if you found any great difficulty in finding a place anywhere in the gorge to stick your stakes? Objected that he has already testified he stuck stakes all the way through. Objection overruled.

Ans. There may have been one or two places, may have been three or four. I am not certain, where you could not get every stake in, I think there are two places, three places, where it would be necessary, perhaps you would miss one stake.

506 Ques. Now you have seen the map which has been offered here in evidence by Mr. Holbrook, I think he identified it; spoke from it; you may state whether or not an engineer could take that map, the profile, and without any stakes find where a line was?

Ans. I would not think he could.

Ques. What is the necessity for having the stakes in order to locate the line, when you have got the profile?

Ans. To put in the side stakes, you see you have got to have the center line before you can side stake.

507 Ques. In using the field notes, and looking for a line surveyed, of what use are the stakes to you if you had got field notes?

Ans. You have got to have something to start from, because you don't know where his course was, it may be twenty-five or fifty feet off his line, you have got no stakes, got nothing to guide you at all in starting.

Ques. Have you been through the cañon since you stopped work in the cañon this last spring?

Ans. Have not been through the cañon; no, sir.

PLAINTIFF REBUTTING.

FOLIO

Ques. Have you been through any consider-
508 able portion of it?

Ans. I was at the upper end of it; yes, sir.

Ques. Have you seen the line which has been lately run by the pretended Cañon City & San Juan Company?

Ans. Yes, sir; I was at the upper end of the Royal Gorge.

Ques. How far is it from the work that was done there in 1871? Objected to as not rebuttal.

Mr. Reed for defendant. We admitted here this morning we were running through a part of that same work.

509 *The Court.* I don't think it is necessary to take up any time with that.

Ques. What effect, if any, does the absence of subdivisional lines on the public land through which you are surveying a line for a railroad have upon the correctness or incorrectness of that surveyed line? Objected to.

Ans. It has no effect on the line with the exception you can't tell which quarter section—which quarter the line will strike when it is subdivided.

Ques. What effect, if any, do the subdivisional lines have when you come to correct any faults that you have made in your line, or to enable you
510 to detect the faults by measuring from one corner to another?

Ans. I don't know as they have any effect at all.

The government surveys are so incorrect in this country, you cannot depend upon them; where they are subdivided you can get a copy of the field notes from the surveyor general's office, and thereby correct the notes from that, find out where the incorrectness is.

PLAINTIFF REBUTTING.

FOLIO

Ques. In your work in the cañon, so far as you have gone how have you found the line upon which the Cañon City & San Juan Company is now constructing their work variant from their

511 original survey? Objected to; not rebuttal.

The Court. His testimony was altogether as to how far it *might be*—how far the line, as located upon the plat, might vary from the actual survey; that was the subject of the examination with him. If this is charged in your bill, it is a part of the original proof.

Mr. Macon. The object of the testimony is to show that Holbrook was incorrect as to the variations going on now.

The Court. He did not go into this subject at all. There was some inquiry of him as to whether these located lines on the plat were correct or not, and would probably prove correct.

CROSS-EXAMINATION OF McMURTRIE.

512 Ques. You say an engineer cannot find his line again without stakes?

Ans. No, sir, not without a starting point.

Ques. You say without stakes there was no guide, a man could not find his line?

Ans. No, sir, he could not run the same line through that cañon without any.

Ques. Without stakes there is no location?

Ans. No, sir, there may be a location on the map.

Ques. There is no location without stakes, do you say?

Ans. No, sir, there may be a location on the map.

Ques. Or on the ground?

Ans. No, sir.

FOLIO

Ques. When you went through the Grand Cañon and found no stakes of yours at all, you had no location?

513 Ans. I found stakes of mine.

Ques. You said you found them in the Royal Gorge, you didn't find them anywhere else?

Ans. Found a few of them.

Ques. Then you had no location?

Ans. Not on the ground.

Ques. Were not those lines of location, railroad lines, established by courses and distances?

Ans. Yes, sir, you have got to have a starting point.

Ques. When you have a starting point and courses and distances, can an engineer locate his line exactly, as it was located before, from his field notes?

514 Ans. No, sir, I don't think he could through that cañon.

Ques. When you made your pretended location of a railroad were there any township lines?

Ans. Yes sir.

Ques. Any subdivisions?

Ans. Yes sir.

Ques. Are subdivisions necessary to the complete location of a railroad?

Ans. Not necessary.

Ques. Have they anything to do with it, at all in locating through that Grand Cañon and Royal Gorge?

Ans. Not when they get right of way.

Ques. I am asking in regard to the engineering portion of it—the location of the line?

515 Ans. No sir, it has got nothing to do with it.

Ques. I mean without township lines or sub-

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divisions, you can locate a correct line through that Grand Cañon or Royal Gorge, just as well as well as you could without it?

Ans. Certainly.

Ques. And that has nothing to do with it whatever?

Ans. Nothing to do with the location of his line.

Ques. When you came into the mouth of that Grand Cañon, did you find your starting point—did you find it this last time when you entered upon it.

Ans. I don't know, I didn't run this last line.

Ques. Was there any starting point—did you see your starting point where you commenced to survey?

516 Ans. Yes sir, could see it.

Ques. What was it?

Ans. It was right at the end of the Cañon City bridge.

Ques. If another party had started from the same point, could they have found the line?

Ans. If they started the same distance I did from the bridge, if they started exactly at the same point.

Ques. You say without a starting point a man could not find his line again—was there a stake at your starting point?

Ans. Yes sir.

Ques. Did you find it this last time?

Ans. I don't know as I did.

Ques. How did you find your initial point then?

517 Ans. I don't know that I started exactly at the same point

FOLIO

Ques. Then, if you didn't start at the same point, you didn't start upon your old location?

Ans. Started on the same right of way.

Ques. Through almost the entire distance of that Grand Cañon, if you went through it at all, you would be upon what you call right of way, would you not?

Ans. Yes, sir.

Ques. So would the other parties, would they not?

Ans. Yes, sir.

Ques. What was it you said about faults in the line to be corrected?

518 Ans. A man in platting up his line might turn an angle either to the right or left, the wrong way. If he had his township line he could find where the mistake was.

Ques. If a man had a starting point, as you say, had his field notes, courses and distances, would he turn the wrong way?

Ans. He might do it in platting up the line when he had his field notes.

Ques. You mean if it was S. 30 W——.

Ans. He might turn N. 30 E.; he might make that mistake.

Ques. It would be necessary to have a stake to correct that?

Ans. No, sir.

Ques. Only a re-examination of his notes?

Mr. Macon. That is all, with the exception of

519 Gen. Palmer's testimony. Thought that Gen. Palmer would be here in ten days—can't tell with any certainty.

On Wednesday afternoon, July 24th, counsel for defendant reads the stipulation in writing on file in this case as to admission of maps in evi-

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520 dence, admitting that the local land office at Pueblo did enter the right of way upon the township maps, and agreeing that the following letters may be entered upon the minutes, and returned to Mr. Barndollar.

[FIRST LETTER.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., June 12th, 1877.

Register and Receiver, Pueblo, Colorado:

GENTLEMEN: I am in receipt of Register's letter of 2d instant, transmitting proofs of organization of the Cañon City and San Juan Railway Company, together with map of route of the company's road from Cañon City to a point on the Arkansas river twenty miles distant, and asking if other papers are necessary, etc. Although there is no statement indicating the purpose for

521 which the papers and maps are filed, it is supposed from the fact that they appear to conform to the requirements of that law, that they were submitted to obtain for the company the benefits of the Act of March 3, 1875, granting to railroads right of way over the public lands. Believing them to be in due form, I have therefore forwarded them to the Hon. Secretary of the Interior for his action.

It would be better, however, for the president of the company to transmit through you an offic-

522 ial statement of the purpose for which they were filed, thus perfecting the record.

Respectfully,

M. J. BAXTER, *Acting Commissioner.*

[SECOND LETTER.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., June 22nd, 1877.

Register and Receiver, Pueblo, Colorado:

GENTLEMEN: You will please inform the President of the Cañon City and San Juan Railway Company that the due proofs of the organization of the company, in compliance with the Act of March third, 1875, transmitted to this office by you, June 2, are acceptable to the Honorable Secretary of the Interior, who has approved the map, showing line of company's road from where it
523 connects with the Denver and Rio Grande Railway in the southeast ¼ Sec. 28, T. 18, S. R. 70 W., to a point in the S. W. ¼ Sec. 26, T. 18, S. R. 73 W., Colorado, a distance of 20 miles in length. A copy of said map will be transmitted to you with instructions in a few days.

Respectfully.

J. A. WILLIAMSON, *Commissioner.*

[THIRD LETTER.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., July 13th, 1877.

Register and Receiver, Pueblo, Colorado:

GENTLEMEN: Referring to your communication of 2nd June, ultimo, transmitting articles of incor-
524 poration, etc., of the Cañon City and San Juan Railway Company, and map of line of route of that company's road from Cañon City to a point on the Arkansas River, twenty miles distant; I now transmit you copy of said map, it having received the approval of the Honorable Secretary

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of the Interior as having been properly filed by the company to obtain right of way over the public lands under the Act of Congress, approved March 3, 1875. By the public survey this line of route extends from a point where the road con-
525 nects with that of the Denver City and Rio Grande Railway Co., in the S. E. ¼ Sec. 28, T. 18, S. R. 70 West, along the Arkansas River, to a point in the S. W. ¼ Sec. 26, T. 18, S. R. 73, W., Colorado. You will immediately lay down upon the proper plats the line of route of the road as indicated in the map, and, after receipt of these instructions, will dispose of the public lands over which the road will pass, subject to the company's right of way; and to the end that no difficulty or misunderstanding may arise as to the fact of their
526 having been so disposed of, subject to such right, you will make endorsement to that effect in red ink across the face of every receipt and certificate issued by you upon claims for such lands, *where such claims may be initiated in your office subsequent to receipt of these instructions.*

Please acknowledge receipt, giving date of reception, and reporting compliance with instructions.

Respectfully,

M. J. BAXTER, *Acting Commissioner.*

Defendant's counsel offer to the Court the following letter from Mr. B. F. Rockafellow, relating to his evidence in this case:

527 LAW OFFICE OF H. M. & W. TELLER,
DENVER, COLORADO, July 24th, 1878.

Hon. Moses Hallett, Judge U. S. Dist. Court:

MY DEAR SIR: I have the honor to request that in my testimony yesterday, where reference

is made to building R. R. to Cañon from Labran, that my answer be made to read that "we should *help* pay for it," instead of "pay for it," as I think was entered.

I am your obed't serv't,
B. F. ROCKAFELLOW.

[EXHIBIT NO.—]

Advertisement in Pueblo Chieftain of April 21st, shown to Mr. A. A. Robinson by plaintiff's counsel upon cross-examination:

PROPOSALS.

ENGINEER'S OFFICE,
PUEBLO & ARKANSAS VALLEY R. R. CO.,
PUEBLO, April 20th, 1878.

Proposals for one hundred and seventy-five thousand narrow-guage railroad cross-ties will be received by the undersigned at Pueblo, Colorado, until 6 o'clock, p. m., Saturday, May 11th, 1878, to be delivered as follows: Fifty thousand by September 1st, 1878, on the line of the Pueblo & Arkansas Valley Railroad between Trinidad and Dick Wooten's; Seventy-five thousand between same points by October 1st, 1878; Fifty thousand to be delivered by November 1st, at and between Cañon City and the west end of the Grand Cañon. Forms for bids and other information will be furnished on application at my office in the passenger depot of the A., T. & S. F. R. R. Company, Pueblo, Colo. A good bond for the completion of the contract will be required. The right is reserved to reject any or all proposals.

A. A. ROBINSON, *Chief Engineer.*

I, Henry L. Denison, the person mentioned in the stipulation of counsel, filed in the cause mentioned in the caption of the foregoing depositions, and in the said stipulation appointed to reduce to writing, and report the evidence in said cause under the control and supervision of the

Court, do hereby certify that the foregoing depositions, were taken in open Court, in the Circuit Court of the United States, for the District of Colorado, on the twenty-second, twenty-third and twenty-fourth days of July, A. D. 1878, and were by me, then and there reduced to writing, under the direction and supervision of said Court, and that the several, writings and documents above set forth, and the exhibits marked by the Clerk of the Court No. 1, No. 2 and No. 3 and No. 4 and No. 5

were offered and given in evidence in said cause, during the taking of said depositions, and at the same time aforesaid, and that each of said witnesses was before his examination duly sworn according to law. And the above was all the testimony offered or given in said cause by either party.

In witness whereof, I have set my hand this twelfth day of August A. D. 1878.

Henry L. Denison

District of Colorado ss.

I, Moses Hallett, District Judge of the United States for the District of Colorado, do hereby certify that the foregoing depositions of witnesses as well on the part of the plaintiff as of the defendants, in a certain cause in the Circuit Court of the United States for said District, depending, wherein the Denver and Rio Grande Railway Company is plaintiff and Ebenezer T. Alling and others are defendants, were taken and given in open court, in the said Circuit Court, at the July term thereof, A. D. 1878, and on the days mentioned in the foregoing report thereof,

by Henry L. Denison, Esq., mentioned, under the direction and supervision of the said Circuit Court, wherein as District Judge of the said District, I was then presiding, and that the several interrogatories and objections thereunto, and answers to such interrogatories and the rulings of the Court upon such objections in the foregoing report of said depositions mentioned were propounded, made and given as in said report set forth, and that each of said witnesses was duly sworn and afterwards examined by counsel in open Court, and the aforesaid depositions were in open Court reduced to writing by said Henry L. Denison, and the documentary evidence in said report mentioned, and the exhibits thereunto attached, and respectively marked:

No 1, No 2, No 3, No 4 and No 5,

were severally offered and given in evidence in said cause at the time of the taking of said depositions. And the foregoing is all the testimony offered or given at the hearing of said cause.

Witness the Hon Moses Hallett, District Judge of the District of Colorado, this 12th day of August A.D. 1878.

Moses Hallett,
Judge.

EXHIBITS.

FOLIO

And the exhibits B, C, and D, No. 3, filed with the said report of testimony were and are in
533 words and figures as follows, to wit:

EXHIBIT "B."

CAÑON CITY, COLO., May 7, 1874.

To the Citizens of Cañon City:

GENTLEMEN—The Denver and Rio Grande Railway Company will extend their line from the present terminus, near Labran, to Cañon City, on condition of one hundred thousand dollars in bonds of Fremont county being delivered to them, or on condition of the delivery of $50,000 in the bonds of the town of Cañon City, legally issued, to them, and $50,000 worth of real estate being deeded to them, or order in default of the delivery of the $100,000 county bonds. The deeds to real estate may be void in case of delivery of bonds as aforesaid within one year from the com-
534 pletion of the road.

Yours, very truly,

(Signed) WM. S. JACKSON, A. V. P.

Endorsed:

No. 154—Circuit Court United States. Denver and Rio Grande Railway vs. Cañon City and San Juan Railroad et al. Exhibit "B" by defendants. Filed July 23d, A. D. 1878.

(Signed) EDWARD F. BISHOP, Clerk.

EXHIBIT "C."

WM. S. JACKSON, Treasurer.

DENVER AND RIO GRANDE RAILWAY,
TREASURER'S OFFICE,
COLORADO SPRINGS, COLO., March 31, 1873.

535 *Thos. Macon, Esq., and B. F. Rockafellow, Esq.,*
Canon City, Colorado:

GENTLEMEN—Your favor of the 27th inst. re-

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ferring to alterations that you deem it politic to have made, in the proposition of W. J. Palmer, President, made to your people through his letters of 18th and 20th insts., is at hand.

Gen. Palmer left for New York on the 21st inst., and it is expected will sail to-day from that point for the City of Mexico, so that he cannot be reached to confer with in regard to changes suggested by you, and I am not authorized to alter or amend his proposition to you.

When the line is completed to Cañon City, it will be that much line built in the direction of the
536 iron fields of Grape Creek, thereby rendering this rich and valuable iron deposit much easier of access and much more likely to be early developed than it will be by the terminus of the road remaining as at present, at Labran. This should give the voters of Wet Mountain valley an interest in having the line extended, and I am of the belief you will not find the opposition in that direction you are anticipating.

Awaiting your letter giving material you deem expedient to lay before the Commissioners promised by next mail, I am yours very truly,

(Signed) WM. S. JACKSON,
Secretary and Treasurer.

Endorsed:

537 No. 154—Circuit Court United States. Denver and Rio Grande Railway vs. Cañon City and San Juan Railroad et al. Exhibit "C" by defendants. Filed July 23d, A. D. 1878.

(Signed) EDWARD F. BISHOP, Clerk.

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EXHIBIT "D."

THE DENVER AND RIO GRANDE RAILWAY CO.,
PRESIDENT'S OFFICE,
COLORADO SPRINGS, March 18th, 1873.

B. F. Rockafellow, Esq., Cañon City, Colorado:

DEAR SIR—At your request I send you the following letter containing the purport of our conversation to-day. I do not consider that the ex-
538 pense of continuing our line in the Arkansas valley, from Labran to Cañon City, and of keeping it up, will be warranted, unless your people come forward to help with the work. But if the things hereinafter named are done, we will proceed to raise the funds as rapidly as possible, and if successful will complete the road to a depot not farther than three-fourths of a mile from the new brick hotel in Cañon City, and will put the same in operation within six months from the date on which the additional bonds named below are de-
539 posited with a trustee as stated.

1st. The 50,000 bonds already voted, and to which the company is now entitled, to be placed at once in the hands of Chas. B. Kountz, Vice-Pres. Colo. National Bank of Denver, or other trustee satisfactory to our company, with instructions to deliver the same to the Denver and Rio Grande Railway Company when the bridge over the Arkansas is finished, and the iron laid across it.

2d. The county to vote an additional 50,000 of 8 per cent. thirty-year coupon bonds, the coupons receivable for all taxes. The interest on said
540 bonds to accrue from the date at which the line is completed to the aforesaid depot at Cañon City, the said bonds to be likewise deposited with the above mentioned trustee with instructions to de-

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liver the same to the Denver and Rio Grande Railway Company upon the completion of the track to a depot situated within three-fourths of a mile from the new brick hotel aforesaid.

3d. The Cañon City people to procure the right of way, fifty feet wide, free of cost to the railway company, from the present end of track to the property of the Central Colorado Improve-
541 ment Company, near the mouth of the Arkansas Cañon, and to place a perfect title for the same in the hands of the before named trustee, which conveyances shall be handed over to the railway company as the line is built over the various properties.

4th. Your people to aid in procuring business for the line by the fitting up the Warm soda springs for three years free of cost. Bath houses to be erected and the locality to be made accessible to invalids and tourists. A sum not less than $2,000 to be exspened during the four current months following the commencement of construc-
542 tion of the railroad, and $1,000 more within the current year, and a further sum of $1,000 yearly while the lease continues, and while they shall occupy the springs. The improvements to be taken off the hands of the parties at a fair appraised value, when the company shall conclude, after the expiration of said three years, to extend the work of improvement on their own account.

5th. The 600 acres, be the same more or less, of land accruing from A. E. Matthews under a contract for constructing a ditch to irrigate it, to be relieved from that part or the agreement re-
543 quiring the ditch to be built, and that one half of the land due under said contract shall be deeded

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to the Central Colorado Improvement Company, or as they may direct, in fee. The deed to be deposited with the trustee named previously, and to be handed over on completion of the line to depot aforesaid. In the event of the ditch being built according to the original understandstanding (except as to time) within three years from the date hereof, the title to the whole amount of land as originally agreed to be delivered to the Central Colorado Improvement Company.

The coupons of the 100.000 of the bonds of
544 Fremont county, due under this arrangeement, to be made payable either in New York or at County Treasurer's office, at option of holder, and to be receivable for taxes.

In conclusion, I trust the citizens of your county will be able to hold out the above named inducements to immediate construction.

Yours respectfully,

WM. J. PALMER, President.

No. 154.—Circuit Court United States. Denver and Rio Grande Railway vs. Cañon City and San Juan Railroad et al. Exhibit "D" by defen-
545 dants (letter of W. J. Palmer, President. Filed July 23d, A.D. 1878.)

(Signed) EDWARD F. BISHOP, Clerk.

DECREE.

FOLIO

And afterwards and on, to wit, the 24th day of August, A. D. 1878, the same being one of the regular juridical days of the July term, A. D. 1878, of said court, the following DECREE was had and entered of record in said court and in said cause, to wit:

DECREE.

546 THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY —against— THE DENVER AND RIO GRANDE RAILWAY COMPANY. | *In Chancery for Injunction and other Relief.*

This cause coming on to be heard at this term of the court upon the pleadings of the said parties respectively, and the testimony heard before the court in the certain cause in equity at this same term of this court depending wherein the said Denver and Rio Grande Railway Company is plaintiff and Ebenezer T. Alling et al. are defend-
547 ants, which, by agreement of counsel, was also heard and considered in this above entitled cause, and upon consideration thereof it is ordered, adjudged and decreed as follows, viz:

That the injunction heretofore awarded against the said plaintiff herein be and the same is hereby dissolved, and that said plaintiff be at liberty to proceed with the construction and completion of its railroad from Cañon City, in the county of Fremont, through the certain defile known as the Grand Cañon of the Arkansas, and along the line marked in its plat, map or profile of the survey of
548 said road heretofore and on the 23d day of July, A. D. 1877, filed with the Receiver of the Land Office, at Pueblo, Colorado, and bearing the approval of the Hon. Carl Schurz, Secretary of the

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Interior, to the end of the twentieth mile from Cañon City, as marked on said map, and that the said defendant, its officers, agents and servants do from henceforth absolutely desist and refrain from preventing, obstructing or interfering with the construction of the said railroad along said line, or in any way or manner attempting so to do; but that the said defendant be at liberty nevertheless to construct its line of railroad from Cañon 549 City aforesaid through the said cañon and up the valley of the Arkansas upon any proper route which it may select within or without the plaintiff's way or right of way, provided it do not in the construction or operation thereof obstruct or prevent or interfere with the construction or operation of the plaintiff's said road; along the line aforesaid and with liberty to the said defendant, if necessary, to locate and construct its line of railroad across the railroad of said plaintiff upon the same grade therewith at the point or points, place or places of crossing; and that defendant 550 have liberty at any time hereafter to exhibit its bill in this or any court of competent jurisdiction to compel the plaintiff to adhere to its line aforesaid and to so change the line of its said road and locate and construct its road at all points on the line thereof so as to permit the convenient and proper location and construction of defendant's road, or to compel the plaintiff to permit the defendant to occupy the track and roadway of the plaintiff, if at any point in said defile it shall be impracticable to conveniently construct or safely operate two lines of railroad.

Ordered that the defendant have liberty to 551 make surveys at any reasonable time of the line

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of the plaintiffs' railroad, but so as not to unnecessarily interfere with the plaintiff's working parties or engineers engaged thereon; that if the defendant shall lay its line of road in any part thereof, in that part of said cañon known as Royal Gorge, cŏmmencing at or about the centre of the northwest quarter of section twenty-six, at a point seven or eight hundred feet above a ravine coming in from the north on said river, and extending up said river to the centre of the south half of the northwest quarter of section twenty-two, township eighteen, south of range seventy-one
552 west, in the county of Fremont, supposed to be about sixty-six hundred feet in length, on the opposite side of said river from the plaintiff's road, then defendant may proceed at once to the construction of its road in those parts thereof; but wherever defendant's road shall within the limits above defined be located upon the same side of the river with the plaintiff's road, the defendant shall not, at any point, attempt to construct its road until the plaintiff shall have completed its road at such place; provided plaintiff shall complete its road between the limits aforesaid within
553 six months of the rendition of this decree.

Ordered that plaintiff recover its costs and have execution therefor.

Thereupon, the said defendant prays an appeal from the decree aforesaid to the Supreme Court, and it is allowed to it; and it is ordered that defendant give bond in its said appeal, conditioned according to law, and with sureties approved by one of the Justices of this court.

AFFIDAVIT AS TO VALUE OF MATTER, &c.

FOLIO

And afterwards, and on, to-wit, the 28th day of August, A. D. 1878, came again the said defendant, by H. A. Risley, Esq., its Solicitor, and filed
556 in said court, and in said cause a certain *affidavit as to value of matter in controversy*, in words and figures as follows, to-wit:

AFFIDAVIT AS TO VALUE OF MATTER IN CONTROVERSY.

THE UNITED STATES OF AMERICA, }
DISTRICT OF COLORADO. }

In the Circuit Court of the United States, within and for said District. Of the July Term, A. D. 1878. In Equity.

THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY
—versus—
THE DENVER AND RIO GRANDE RAILWAY COMPANY.

Hanson A. Risley, being first duly sworn, saith on oath that he is the general solicitor of the above named defendant, and on behalf of said defendant and in order to show that defendant is entitled to an appeal from the final decree of this
557 honorable court given herein at this above entitled term, deponent saith that he hath heard read the bill and answer in this cause, and is familiar therewith, and knows the matter in dispute in this cause, and that said matter in dispute, in respect to which this honorable court hath decreed against the said defendant, exclusive of costs, exceeds in value five thousand dollars. And further saith not.

(Signed) HANSON A. RISLEY.

FOLIO

Subscribed and sworn to before me this August
558 27th, A. D. 1878.

[L. S.] (Signed) EDWARD F. BISHOP,
Clerk Circuit Court, U. S.

Endorsed:

No. 155.—Circuit Court, United States.—Cañon City and San Juan Railway Company versus Atchison, Topeka and San Juan Railway Company. Affidavit of H. A. Risley as to value of matters in controversy. Filed August 28th, A.
559 D. 1878.

(Signed) EDWARD F. BISHOP, Clerk.
H. A. RISLEY, Solicitor for Def't.

And afterwards and on to-wit: the 7th day of September, A. D. 1878, came again said complainant, by H. A. Risley, Esq., its solicitor, and filed in said court and in said cause its bond in appeal, which said bond is in words and figures, as follows, to-wit:

BOND FOR APPEAL.

Supreme Court of the United States.

THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY,
—versus—
THE DENVER AND RIO GRANDE RAILWAY COMPANY

560 Know all men that we, *The Denver and Rio Grande Railway Company*, a corparation organized under the laws of the State of Colorado, as principals, and *R. F. Weitbrec*, *W. A. Bell* and *Wm. Wagner*, as sureties, are held and firmly bound unto the Cañon City and San Juan Railway Company, in the sum of five hundred dollars, to be paid to the said Cañon City and San Juan Rail-

FOLIO

way Company, their executors or administrators; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators firmly by these presents.

In Witness Whereof, The said Denver and Rio
561 Grande Railway Company hath caused its corporate seal to be affixed to these presents; and the said R. F. Weitbrec, W. A. Bell and Wm. Wagner hath set their hands and seals, this sixth day of September, A. D. 1878.

WHEREAS, The said Denver and Rio Grande Railway Company hath prayed an appeal to the Supreme Court of the United States to reverse the decree given in the above entitled cause by the Circuit Court of the United States for the District of Colorado, at the July term, A. D. 1878, of said Circuit Court.

562 *Now, therefore*, The condition of this obligation is such that if the said Denver and Rio Grande Railway Company shall prosecute its said appeal to effect and answer all costs, if it shall fail to make good its plea, then this obligation shall be void, otherwise in full force and virtue.

(Signed)

THE DENVER AND RIO GRANDE RAILWAY COMPANY.

563 By H. A. RISLEY, Solicitor. [L.S.]

(Signed) R. F. WEITBREC, [L.S.]

" WILLIAM A. BELL, [L.S.]

" WILLIAM WAGNER. [L.S.]

[L.S.] Attest: (Signed) WM. WAGNER,
Sec'y D. and R. G. R'y Co.

Bond approved and appeal allowed, September 6, A. D. 1878.

(Signed) MOSES HALLETT,
District Judge of the United States for the District of Colorado.

CERTIFICATE OF CLERK.

FOLIO

Endorsed;

564 No. 155.—Circuit Court, U. S. Denver and Rio Grande Railway Company *ats* Cañon City and San Juan Railway Company. Bond in appeal. Filed September 7th, A. D. 1878. (Signed) Edward F. Bishop, Clerk.

CERTIFICATE OF CLERK.

DISTRICT OF COLORADO, } ss.

I, Edward F. Bishop, Clerk of the Circuit Court of the United States, for the District of Colorado, do hereby certify the above and foregoing to be a true, perfect and complete transcript and copy of the transcript of proceedings had in the certain cause above mentioned, in the District Court of Fremont county, and removed into said Circuit Court, lately filed in said Circuit Court; and of the proceedings had in the matter of said removal; and of all proceedings had in the said Circuit Court therein; the amended bill filed therein, with the exhibits thereto attached; demurrer thereto; the amendments to said amended bill; the opinions of the judges filed in said cause; the answer of defendant to said bill as amended; the cross-bill of complaint, and exhibits attached thereto, the subpœna sued out thereon, the stipulation as to answer, evidence, etc., the answer of the said defendant and exhibit attached thereto, the replication to the said answer, the motion to dismiss the said cross-bill, and of all orders and decrees had and entered of record in said court in a cause in said court lately pending, wherein the Cañon City and San Juan Railway Company was complainant, and the Denver and Rio Grande

CEETIFICATE OF CLERK.

FOLIO

Railway Company was defendant, together with the certain paper writings heretofore exhibited to said court, marked as therein set forth and filed, and the transcript of testimony heretofore heard, and filed in the certain cause in said court lately pending, wherein the Denver and Rio Grande Railway Company was complainant, and the Cañon City and San Juan Railway Company was defendant, as fully as the same still remain filed or of record in my office.

In testimony to the above I do hereunto sign my name and affix the seal of said court at Denver, in said district, this day of September, A D. 1878.

Clerk.

Clerk's fees.

folios @ 10c. and ctfi. $

Paid by

IN THE SUPREME COURT,
OF THE
OCTOBER TERM, A. D. 1878.

THE CANON CITY AND SAN JUAN RAILWAY CO.,
Appellee.

vs.

THE DENVER AND RIO GRANDE RAILWAY CO.,
Appellant.

THE DENVER AND RIO GRANDE RAILWAY CO.,
Appellant.

vs.

EBENEZER T. ALLING, ET AL,
Appellees.

BRIEF OF H. A. RISLEY,

FOR APPELLANT.

IN THE SUPREME COURT,
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OCTOBER TERM, A. D. 1878.

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BRIEF OF H. A. RISLEY,

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THE CANON CITY & SAN JUAN RAILWAY CO.,
Appellee,

vs.

THE DENVER & RIO GRANDE RAILWAY CO.,
Appellant.

THE DENVER & RIO GRANDE RAILWAY CO.,
Appellant,

vs.

EBENEZER T. ALLING, ET AL,
Appellees.

STATEMENT OF THE CASE.

[The questions presented in the two above entitled cases are substantially identical; and it has been agreed by counsel that the same may be argued together.]

In the first case the action was originally brought in the State Court, and was removed into the Circuit Court, under the act of March 3rd, A. D. 1875.

May 8, 1878, an order was made modifying an injunction which had been allowed in the State Court, and restraining the defendant from locating, or attempting to locate, or survey, a road through specified parts of the Grand Canon of the Arkansas. On leave given, an amended bill was filed on the 9th of May (Record fol. 106), setting forth the incorporation of the Company under the general law of Colorado (Rev. Stat., Ch. XVIII.), on the 17th day of February, A. D. 1877; that the purpose and object of the corporation was to construct and maintain a railroad from Canon City, in the County of Fremont,

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NOTE.—In this Record the folios are numbered in two series. The first, from fol. 1 to fol. 324, includes all the proceedings down to the filing of the report of the oral testimony heard in open Court; the second, from fol. 1 to the end, includes the report of testimony and all subsequent proceedings.

up the Arkansas River, through the Grand Canon thereof to the South Arkansas Post Office, in the County of Lake; that in April, 1877, it surveyed and located its line, staked it, and graded it at various points,—one at the entrance of the said Grand Canon; that the same grade has ever since been, and now is, in its possession; that to secure to itself the benefits of the "Act granting to railroads the right of way through the public lands of the United States," approved March 3, 1875, it caused a plat and profile of the road to be made, and filed the same with the Register of the Land Office, &c., within twelve months after the survey, and procured the approval of the Secretary of the Interior; and said plat and profile was thereupon noted on the plats of the land office, etc., and plaintiff thereby "became entitled to a right of way one hundred feet on each side of the center of the track, over the said line of survey and plat of your orator," and is legally possessed thereof.

That the lands over which the line was located were public lands, not within any military park or Indian reservation.

That the Denver & Rio Grande Railway Company, on the 19th of April, invaded plaintiff's possession, and commenced to destroy the graded part of its road bed, and commenced to establish a different grade, and threaten to exclude plaintiff etc. That the located line lies through the Canon of the Arkansas; shows the character of the defile; shows irreparable injury.

Prays an injunction.

The articles of association are attached as an exhibit.

An amendment (Record fol. 232) shows that plaintiff, within twelve months after the survey, and before the commencement of this suit, filed with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the laws of Colorado, and of the said articles of incorporation.

July 12th the defendant answered (Record fol. 302), denying the incorporation of the plaintiff and its title; denying, also most of the substantial matters alleged in the bill, and presenting substantially the same facts as in the original bill and amendments filed in the second case, as hereafter set forth; averring, moreover, that the parties acting in the name of the Canon City & San Juan Railway Co., *had shifted and changed the line*

of said railway mentioned in the bill, from that marked on the plat referred to therein.

The defendant, also, on the same day, filed its cross bill (Record fol. 236), setting forth the same case as stated in the answer, claiming exclusive rights in the narrow part of the canon, praying an injunction; but, also, praying that if, in the opinion of the Court, the defendant had a right in the canon it should be declared subordinate to the right of plaintiff; also, praying an injunction to restrain the defendant from changing its line, or *constructing any railway, in whole or in part, upon any other line than that set down in its plat or profile.* In this respect the prayer is more extensive than that of the original bill in the second case.

July 17th, Replication was filed.

July 18th, the plaintiff in the original bill moved to dismiss the cross bill (Record fol. 379), because filed without leave of Court; that there was already, at the time of filing it, a cross bill on file; that no discovery or relief is prayed, except as already asked in former bill.

August 2nd, this motion was sustained (Record fol. 382).

It was stipulated that after issue joined, the evidence to be taken in the case of the Denver & Rio Grande Railway Co. vs. Alling et al, should stand and be considered as proofs in this case upon the final hearing (Record fol. 299).

In the second case the Denver and Rio Grande Railway Co., plaintiff, filed its bill in the Circuit Court, April 27, 1878, setting forth its incorporation under the general law of Colorado, in October, A. D. 1870. That the certificate specified as the object of the corporation, to construct, maintain and operate several lines of railway, among which, designated substantially as follows, were (1), *The Denver & Rio Grande Railway:* commencing at Denver, thence, by a route designated to a point on the Arkansas River, at or above Pueblo: thence up the valley of the Arkansas River to a point at or near Canon City: thence continuing up the valley of the Arkansas through the big canon of the same to a point at or near the mouth of the South Arkansas River: thence by a route designated to the valley of the Rio Grande, thence down that valley to El Paso, New Mexico.

(2) *The Denver & Southern Railway:* commencing on the most eligible point in the line of the Denver & Rio Grande Railway, in the valley of the Arkansas or the Fountain, and running in a general southerly direction to the base of the Spanish Range of the Rocky Mountains; thence across said range to the valley of the Rio Grande: thence down the valley of the Rio Grande to a connection with the Denver & Rio Grande Railway and to El Paso. (4) *The Western Colorado Railway:* commencing at a point on the said Denver & Rio Grande Railway at or near the mouth of the South Arkansas River: thence up the main Arkansas to the summit of the range dividing the waters of the Arkansas and the Grand River of the west, etc.

The bill fails to set forth the whole of the contents of the articles of association but they are made part of the record by stipulation. (Record fol 73.)

The bill sets forth that the certificate was filed in the office of the Secretary of the Territory, and in the office of the clerk of each county through which the line is located.

That by the act of June 8, 1872 (17 Stat., p. 339), it was provided that the right of way over the public domain, one hundred feet in width on each side of the track, with such public lands as might be needed for depots, etc., and the right to take from adjacent public lands, stone, timber, earth, etc., should be and was granted to plaintiff, *provided*, plaintiff should complete its railway to a point on the Rio Grande, as far south as Santa Fe, within five years of the passing of said act, and should complete fifty miles additional south of that point in each year thereafter.

That by the act of March 3, 1877, the period of five years mentioned in the act of June 8, 1872, was extended to ten years.

That at the date of the passage of the first act, the plaintiff's certificate of incorporation was matter of record in the public offices of the Territory before mentioned, and its provisions known to Congress. That at the date of the first mentioned act, the big Canon of the Arkansas was, and still is throughout the whole length thereof, on the public domain of the United States; that for the distance of one and one-fourth miles thereof it is not exceeding forty-five feet in width, enclosed by precipitous mountains. An amendment (Record fol. 53) shows

that the canon in this part contains many abrupt angles and curves; that not more than one railway with the way of the width mentioned in the act, can be constructed; that all this was known to Congress at the date of the passage of the act of June 8, 1872; that no more than one railway can be constructed through the narrow part of said canon, except by laying the track of one railway across the other, nor without great and constant hazard of collisions, etc. (Second amendment, Record fol. 53).

That plaintiff having before that completed its railway to Pueblo in the years 1871–2, began to and did survey its road thence, by the valley of the Arkansas, through the big canon; and located and staked it to or in the vicinity of the mouth of the South Arkansas; and in sundry places in and near the canon, excavated and graded the bed and line of its railroad; of which defendants, before their intrusion, had notice; that about 1875, plaintiff completed its railway from Pueblo up the Arkansas Valley to the neighborhood of Canon City, near the mouth of said canon. That about the 19th of April, 1878, it resumed the work of constructing its said railway.

An amendment (Record fol. 191) shows that Canon City is situated immediately upon the Arkansas River, in a narrow valley; that there is no productive, or inhabited, or habitable country anywhere in that vicinity, nor any railway or traffic sufficient to support a railway; that only by penetrating through the canon to the valley of the Arkansas above the canon, could or did plaintiff ever expect to make its railway to Canon of any value; That all this was known to the defendants since 1875.

The original bill further shows, that on the 15th of February, A. D. 1877, the defendants, Alling, Locke and Megrue, filed a certificate of incorporation under the name of the Canon City & San Juan Railway, declaring the purpose of the company to be to construct a railroad from Canon City to South Arkansas Post Office; but failed to show the number of trustees who should manage its affairs, save for the first year, or the name of the town, or place and county, in which the principal office of the company should be kept; charges that by reason of these omissions the certificate conferred no corporate rights.

That on or about the 19th of April, when plaintiff had prepared and was about to resume the construction of its railroad through the canon, The Atchison, Topeka & Santa Fe Railway Company (Seventh amendment, Record fol. 203) and the defendants, Morley, Strong, Robinson and others, acting in the name of the so called Canon City Company, intending to anticipate plaintiff and prevent it from building its line through the canon, occupied plaintiff's line, staked and located in 1872, in the mouth of the canon; and although plaintiff was still occupying the narrow part of the canon, the defendants threaten to dispossess and drive out plaintiff's servants. States circumstances to show irreparable damage. Shows that the defendant company claims under the act of Congress of March 3rd, 1875, (19 Stat. 482). Avers that its line was never surveyed.

An amendment (Record fol. 199) avers that if they ever made a survey it was not staked or marked on the ground; that if any survey was made it was in the winter season, and the stakes, if any, were set in the ice, and were necessarily swept away by the high water of the next spring; that no plat or profile hath been filed in the office of Register of the Land Office of the district wherein the canon is situate, showing upon what particular portion of the public domain, or of the several sections, quarter section or other sub-divisions, the railroad of the so called Canon City Company is in any part located; that no copy of the articles of association, or due proofs of the organization of said company, have been filed with the Secretary of the Interior.

A further amendment (Record fol. 203) avers that the Atchison, Topeka & Santa Fe Company, in the construction of the road, are acting solely for that Company, and not for the so called Canon City Company; that the Canon City Company have not, if all its stock shall be paid up, money sufficient to construct more than five miles of said railroad; that the so called company do not and never did expect to build any such railroad, but the corporators associated themselves and formed the pretended corporation, solely to induce the Atchison Company, a Kansas Corporation, to build the line, with intent that The Atchison Company, and not the Canon City Company shall own, control and operate it.

Injunction prayed.

On the 9th of May an injunction was granted to restrain the defendants from occupying the canon, or attempting to construct a railroad therein. On June 1st this injunction was modified so as to restrain the defendants only in respect to the narrow part of the canon known as the Royal Gorge, in which grading was permitted but the laying of iron was prohibited. Hallett, District Judge, filed an opinion in writing (Record fol. 121) setting forth at length his views of the case stated by the bill; in this the Circuit Judge, Dillon, concurs (fol. 173).

At the July term of the Court, a demurrer to the bill as amended being overruled, the defendants answered:

Alling, and the other defendants named in the bill, as those pretending to be members and officers of the Canon City Company, admit their connection with that company; aver that they have no interest in the matter in controversy except as stockholders; neither admit nor deny the incorporation of plaintiff: admit the act of Congress of June 8, 1872, conferring the right of way upon plaintiff through the public domain; also the act extending the period for the completion of the plaintiff's road to Santa Fe; also that the Grand Canon of the Arkansas is within the public domain; also that the canon is very narrow through the distance of 1¼ miles, and enclosed by precipitous mountains: whether through this distance there is room for only one railway neither admit nor deny; deny that Congress had any knowledge of the physical characteristics of the canon; admit the construction of plaintiff's railway from Denver to Pueblo previous to 1872, and the survey and location of plaintiff's road from Pueblo to Canon; admit its subsequent construction to within a mile or two of Canon City. Deny the survey alleged to have been made through the canon, and the grading alleged to have been done there; aver that plaintiff abandoned the route in question, and has no intention of building there.

The sterile character of the country in the vicinity of Canon City, and the other circumstances alleged in the bill, as evidencing and affording notice of the purpose of the plaintiff to continue its road through the canon, are not noticed: most of the other allegations of the bill are denied.

Aver that the Canon City Company has located its line for the distance of 20 miles up the canon; and in pursuance of the

act of Congress of March 3, 1875; and show the making and filing of a profile, duly approved by the Secretary of the Interior, July 28, 1878, with the Register of the Land Office, etc.

The answers of the other defendants raise no different issues from those presented by the answer of Alling.

Replications being filed pursuant to stipulation of counsel (Record fols. 217, 315), the evidence was heard in open court, reduced to writing and certified by the judge, as well as by the person agreed upon for that purpose, and is set forth in each record. The evidence shows the incorporation of the Denver & Rio Grande Company; the filing of its certificate as stated in bill. (Evidence fol. 468.)

That in February 1871 it surveyed and staked a line through the entire canon (Evidence fols. 227, 230, 147, 150, 364-5). The stakes bore figures and numbers (Evidence fols. 150, 257). The object of the survey was to control the canon. (365.)

Maps of the alignment and of the profile were made (158), and returned to the chief engineer (170, 392), and plats and estimates to the General Manager of the company. (Fols. 362, 392.)

In May, 1871, about 500 feet of grade was constructed at the upper outlet of the canon, supported for a considerable part of the distance by a retaining wall of masonry ten to fifteen feet high (fols. 154, 257, 270), of substantial character (189, 268). This grade and masonry still remains (154), and was seen by the engineers of the Canon Company when they made their survey in 1877 [299, 421]; many of the stakes, also, were standing at the commencement of this controversy [152, 208, 215, 298], though in places there were no stakes for 800 to 1000 feet [219]. The purpose of this work was to preserve the right of way through the canon [366], and the intention then was to build there [365], as fast as means could be obtained. [365.]

At the time of this survey, the company were engaged in locating their road southward from Denver. [186.]

The company completed its road to Pueblo about June 15, 1872 [223], to Labran, eight miles below Canon City, about October 1, 1872 [323-4], and to Canon City in July, 1875.

In the summer of 1873, the company commenced, at Pueblo, to construct the Denver & Southern Railway, reached Cucharas,

fifty miles from Pueblo, February, 1876 [306], Garland, sixty miles further, August, 1877 [327], and the valley of the Rio Grande, July, 1878 [329]. This line has been known as the Denver & Rio Grande Railway [331]; the line running to Canon City as the Arkansas Valley Division, and by laborers on the road as a branch [331, 332]; so also in a report of the president to the stockholders. [334, 605.]

The extension to Canon City was with the assistance of the inhabitants of Canon City, who contributed in bonds and real estate $100,000 [348, 350 476], and the president wrote declining to extend through this eight miles without this assistance, upon the ground that "the expense of continuing our line in the Arkansas Valley, from Labran to Canon City, and of keeping it up, will not be warranted, unless your people come forward to help with the work." [538.]

The road was not pressed westward from Canon City on account of the depression in business, rendering it impossible to raise money for such enterprises (359); the extension southward was thought to afford the greatest promise of immediate results (359), and for fear that another company might build south from Pueblo, which was the shorter line, if the construction of it should be deferred (371); the intention was to build from Canon City whenever they could secure the means. (387).

No other practicable line exists from Canon City westward. (160, 197, 210.)

The report of the president to the stockholders for the year 1873, which was put in by the other side, mentions the line up the Arkansas river as a branch (fol. 561), Canon City as its proper *terminus* (548), and the accompanying map shows no projected extension therefrom. This report, however, adverts to and emphasizes the dependency of the upper Arkansas Valley upon this road for lumber and fuel (561), enlarges upon the wealth of that country (581, 591,) and asserts (598) that "In due time connecting railway lines will be extended up these passes, to further develop the several rich and extensive districts which they will penetrate."

As to the rights of the Canon City Company, the evidence discloses the filing of the certificate under which corporate capacity was claimed for it, in February, 1877.

It sets forth [Record fol. 67], "V. That the principal place of business of said company shall be Canon City, at the said County of Fremont. VI. The number of trustees of said company who shall manage the business concerns of said company for the first year shall be nine." The directors of this company were examined on behalf of the Denver and Rio Grande Company, and evidence was extracted, strongly tending to show, and as we contend, conclusively showing, that the real control of the work of construction was being carried on by the Atchison, Topeka and Santa Fe, and that the Canon City Company was a mere straw company, organized without any bona fide purpose to construct the road, and that everything done, had been done in fact by the Atchison, Topeka and Santa Fe company. [Evidence fols. 1, 146, 206–7, 227, 256, 275, 277, 499, 504, 459, 528.]

It was in evidence, further, that the line claimed by the Canon City Company was located on the same ground with the line claimed by the Denver Company, and which they had graded in 1872. [300, 301.]

The map produced by the Canon City Company, bearing the approval of the Secretary of the Interior, appeared to have been filed with the *Receiver* of the Pueblo Land Office; *no evidence was given that it had ever been in the office of the Register;* it was admitted, however, that the local land office at Pueblo entered the right of way on the township maps. [Evidence 520.]

This stipulation is found at fol. 317 of the record in the second case.

No field notes nor other memoranda are found on these maps, to show the point of beginning or ending of the survey of the Canon City Company's line, and although the engineer swore that the field notes were minuted on the original map [fols. 297, 298], the certified copy shows nothing of the sort; and counsel stipulated that this was a true copy of the original. See the Record in the second case. [fols. 317–319.]

In the survey of this line the Canon Company did not set stakes through the close part of the Canon [306]; and did not in fact chain over that part of the line, but obtained it by deduction from a base line, in places; and in other places by triangulation [302, 306, 315]. *The townships were not subdivided, nor the section lines run at the time.* [316.]

The company had in construction relocated and diverted the line from its original location; in one place as much as 120 feet.

The Court decreed a perpetual injunction in the first case, and dismissed the bill of the Denver and Rio Grande Company in the second case, with leave to this company, nevertheless, to build upon any line which it might survey, not interfering with the line marked on the map of the Canon City Company.

ASSIGNMENT OF ERRORS.

We assign for error, in the case of The Canon City and San Juan Railway Company *vs.* The Denver and Rio Grande Railway Company.

1. That the said Circuit Court erred in dismissing the cross bill filed by the appellant.

2. That the said Circuit Court erred in decreeing the relief prayed in the original bill.

3. The said Circuit Court erred in decreeing that the appellee be at liberty to proceed with the construction and completion of its railroad through the Grand Canon of the Arkansas, and along the line marked in the plat, map or profile of the survey thereof, filed on the 23d day of July, A. D. 1877, with the Receiver of the land office at Pueblo, Colorado, and bearing the approval of the Secretary of the Interior; also in decreeing that the appellant be restrained from interfering with the construction of said road.

4. We assign for error the same matters thirdly assigned in the second case.

We assign for error in the case of The Denver and Rio Grande Railway Company *vs.* Alling, *et. al.*

1. The said Circuit Court erred in dismissing the complainant's bill.

2. The said Circuit Court erred in refusing the relief prayed by the complainant's bill.

3. The Court erred in excluding proper and competent evidence offered on the part of said appellant, at the final hearing of said cause, in open court, in this, to-wit:

In excluding the question propounded to the witness, M. N. Megrue, as follows: "State for what purpose the Canon City

and San Juan Railroad Company was organized." [Evidence fol. 3.]

Also, in excluding the question propounded to the same witness: "What arrangements, if any, had the Denver and Rio Grande Railway Company made on that day, before you saw Mr. Clelland, to go into that canon?"

Also, in excluding the question propounded to the same witness: "How many men did you put on that day?" and refusing to permit the appellant to show that out of seven or eight hundred men nominally at work for the Canon City Company, in the disputed canon, that company employed only thirteen. (fol. 28.)

Also, in refusing to allow the witness, Alling, to be examined, to show the amount of money at any time in the treasury of appellee. (fols. 43, 44.)

Also, in refusing to permit the examination of said witness by leading questions. (fol. 61.)

Also, in refusing to permit appellant to interrogate the same witness as to whose funds had paid the expense of construction of the road so far. (62.)

Also, in refusing to permit appellant to interrogate the witness, Raynolds, as to the amount of appellee's stock undisposed of (70); in refusing to permit the same witness to state through whom the appellee had paid the expenses of this litigation. (80.)

Also, in refusing to permit the witness, Clelland, to testify as to what funds the appellee had on the 10th of April, 1878 (116); also, in refusing to permit the same witness to testify as to whether the directors of appellee had exercised control of the construction of its railroad; also, in refusing to permit the witness, Holbrook, to state whether the witness, Robinson, was assuming authority over the work upon appellee's road, before his appointment to any position in the company. (138.)

Also, in refusing to permit the appellant to show by the witness, Holbrook, that the men employed in the construction of the appellee's railway were put to work by the Atchison, Topeka and Santa Fe Railway Company, without communication or correspondence between the two companies. (fol. 165.)

Also, in refusing to permit appellant to show the statements of these men as to who they were working for. (166.)

Also, in refusing to permit the appellant to prove by the witness, Robinson, that he assumed control of the construction of the road through the canon without authority from the appellee. (466.)

I.

The act of Congress, of June 8, 1872, (17 Stat. 339) conferred upon the Denver and Rio Grande Railway Company, in all parts of its line, an immediate and vested interest in the land which the plaintiff has since selected for its way.

The language of the act is "*be and the same hereby are granted and confirmed.*"

These words have in this Court invariably been construed to import a present grant, and not a grant *in futuro*, even though the thing granted be not at the time definitely located or known.

Rutherford vs. Greene's heirs, 2 Wh., 197; Ladiga vs. Roland, 2 How. 211; Lessieur vs. Price, 12 How., 59; Kissell vs. St. Louis Public Schools, 18 How., 17; Garner vs. Nicholson, 9 How., 365; Railroad Co. vs. Smith, 9 Wal., 99; Schulenburg vs. Harriman, 21 Wal., 44; Leavenworth, &c. R. R. Co. vs. United States, 2 Otto 733.

And so in the Courts of the several States where the question has arisen.

Stockton vs. Williams, 1 Doug. Mich., 558; Dequindre vs. Williams, 31 Inda., 446; Fore vs. Williams, 35 Miss., 534; Doll vs. Meador, 16 Cala., 295; Summers vs. Dickenson, 9 Cala., 355; Allison vs. Halfacre, 11 Ia., 450; Fremont County, vs. Burlington R. R. Co., 22 Ia., 116; Supervisors Whiteside Co. vs. States Attorney, 31 Ills., 78; Sherman vs. Buick, 45 Cala., 666.

And at the Circuit—Godfrey vs. Beardsley, 2 McL., 412; Central Pacific R. R. Co. vs. Dyer, 1 Sawyer, 652.

The fact that the line of the road was not every where located at the date of the grant does not destroy its character as a pres-

ent vested grant. When the location of the line is made "the grant then becomes certain, *and by relation has the same effect upon the selected parcels as if it had specifically described them.*"

2 Otto, 741. 2 Cooley Const Laws 886

That the right, when selection is made, relates back to the date of the grant, so as to prevent any intermediate pre-emption right, or other alienation by the Government, is distinctly recognized in Kissell vs. the St. Louis Public Schools, Doll vs. Meador, and Sherman vs. Buick. The judgment in the latter case was reversed in this Court, but the opinion here goes upon a ground which does not at all impugn the authority of the decision of the State Court upon the question now under consideration.

The supposed consequences to those settling intermediate the grant, and the location of the line, are not to avail to defeat the plain intention of Congress. The bounty of Congress was intended to promote, rather than retard, the settlement of the country, and no one doubts that this has practically been its effect; and if occasionally some settler has been, or shall be, compelled to remove his fences or other improvements, the public advantage derived by the construction of the road overbalances the private inconvenience.

And, if it were otherwise, these questions are clearly for the legislative department, which must be supposed to have anticipated all these difficulties.

In the opinion of the District Judge, it seems to be asserted that a grant may be a present one, but still subject to resumption and impairment by subsequent legislation. This, as well said by Mr. J. Rhodes, involves "a palpable contradiction in terms" (45 Cala., 669). The present case affords, perhaps, the first example of the judicial nullification of a public grant, upon the plea of legislative improvidence.

If our first position can by possibility be rejected, we shall then contend:

II.

As to the narrow parts of the canon, the grant was a present and vested one.

By the "railroad and telegraph line" mentioned therein, and for the construction whereof the way was granted, the act of Congress must be understood to refer to the line described in the articles of association. The case of the State vs. Hudson Tunnel Co. (38 N. J., 560), is in point. "Obviously the only one that could have been intended, was that described in the certificate of their organization, which had been previously filed."

The act, therefore, gave the right to build by the line which the company had in the certificate prescribed for itself, "as fully," to use the language of the Court in the case last cited, "as if that description was incorporated in the act itself."

Congress must be presumed to have been acquainted with, and to have had in contemplation, the physical characteristics of the region in which, by the articles of association, the road was laid.

Inh. Springfield vs. Conn. River Railroad Co., 4 Cush., 63; The People vs. N. Y. etc. R. R. Co., 45 Barb., 79.

To say otherwise is to impute to them heedless ignorance. The legislature is conclusively presumed to act upon sufficient information, and to be animated only by proper motives.

The People vs. Lawrence, 36 Barb., 193; The People vs. New York Central R. R. Co., 34 Barb., 137; DeCamp vs. Eveland, 19 Barb., 89; Leisher vs. Scites, 4 W. Va., 11; State vs. Cincinnati, etc., 18 Ohio St., 245.

It is therefore obligatory upon the appellant to build *through the Canon of the Arkansas;* the articles of association lay the route there; and Congress has granted the right of way there, and at no other place. It is as clearly required of them to adhere to the canon as to the *valley* of the Arkansas; or to commence at Denver. The fixed termini and intermediate points named in the charter cannot be disregarded.

Comw. vs. Erie &c. R. R. Co., 27 Pa. St., 339; Worth vs. Junction etc. R. R. Co., 5 McL. 425; State vs. Wilton R. R. Co., 19 N. H., 521; *Semble*—Commrs. vs. Fitchburg etc. R. R. Co., 3 Cush., 240.

The plaintiff being confined by its charter and the grant to the *canon*, and that being less in width than the way granted, the particular portion of the public domain upon which that part of the line will fall is inevitably fixed. As to this no subsequent designation was needed; the grant attached, at its date, to particular lands.

We respectfully submit that the absurdity which the learned District Judge seemed to find in this construction, does not exist. The same words may and must be received in a different sense, when applied to different parts of the grant, in their nature different. No one will assert that the grant of the right of way through the canon, confessedly less than the width prescribed, would not, standing by itself, be present and vested in all respects.

Why shall the uncertainty in the residue of the way granted, detract from the grant of that which is certain? The only reason which ever has been or ever will be assigned, to say that the grant was not throughout its whole length a vested present grant, is that, in certain parts, it was yet to be located; but when the reason fails the rule fails with it. Wherever the location of the line is fixed and definite, the words of the act must be allowed their natural and ordinary effect.

While the grant is not to be extended by implication, it is still not to be frittered away, and deprived of all value by an overstrained construction. "The interpretation must be reasonable, and such as will give effect to the intention of Congress."

Leavenworth &c. R. R. Co. vs. United States, 92 U. S., 740; State *ex rel* West Jerseyville R. R. Co. vs. Receiver of Taxes, 38 N. J., 301.

There is every reason why the grant in this case should be so construed as to save to the appellant, at least, its right of first selection in the mountain defiles.

The certificate of organization which, as before seen, Congress is conclusively presumed to have had before it, shows on its face that the projectors of the enterprise contemplated a system; the whole dependant upon each of the parts for its support.

The Territory of Colorado was then practically a wilderness: In the thirteen years since its first settlement, it had acquired a

population of less than forty thousand souls. These were scattered through immense distances. But one railroad, and that but just completed, had reached the Territory. There were no large towns. Denver, the principal point, did not much exceed four thousand in population. The other communities upon the line of the plaintiff's road, as projected, were mere villages. The valleys of the upper Platte and Arkansas were almost uninhabited. Until the year 1877 those regions were actually without traffic. Below the mountains the valleys of those streams, and the valleys of their few tributaries, were then, and still are, separated by immense wastes; many of the valleys themselves, *e. g.* the Plum, the Monument and the Fountain, afford scarcely any tillable land. The sandy soil, the few and scanty streams, the arid climate, render it impossible that great agricultural communities can ever be formed there; or considerable cities grow up, except by the development of the mineral wealth of the mountains.

By itself, a railway skirting the base of the mountains, traversing, for the most part, an uninhabitable country can never, by any possibility, be profitable, nor scarcely self-supporting. This was as apparent in 1872 as it is now. No one could have expected otherwise. Accordingly it was an essential part of the plan of the sanguine men who projected this enterprise, that the line of the valley should receive the traffic, and in turn afford traffic to, a multitude of branches which, penetrating the mountain passes, should bring from thence the ores there produced, and supply to the people of those localities the products of the farming population at the base of the mountains. These notorious and public facts, are to be noticed by all courts and public bodies dealing with *matters* affected by them. (39 Cala., 40.) The mutual inter-dependence of the whole system, as delineated in the charter of appellant, and all its parts, is perfectly apparent on inspection of the certificate of incorporation, and must have fixed the attention of Congress in making the grant, and must be now born in mind by this Court in interpreting it. And when these things are considered, no one ought to doubt that the purpose of Congress was to confer a present vested right, at least in all those parts of the line where, by the conformation of the ground, no choice of routes is offered.

To adopt another construction is practically to say that Congress took no thought of the practicability or impracticability

of the scheme which it was applied to to foster; or that they were as ready to donate the public lands to an enterprise which was improbable of success, as to a feasible one. It is to emasculate the grant and destroy the value of the very large investment already made, upon the faith of the construction, which the words used in this instance have always before received in this Court.

If the contributors to this novel and worthy enterprise, had supposed that in this paltry donation—paltry when compared with the liberality extended to other like enterprises—Congress, by words of the present, intended that nothing should vest; that when ten years were allowed to construct, and forfeiture denounced for a failure to build within the ten years, it was intended that forfeiture should ensue for the failure to build at once—it is scarcely probable that the grant would have been even accepted.

III.

The rights of the appellant under the act of June 8, 1872, *are everywhere superior to the rights accruing to appellees under the act of March* 3, 1875.

The king can not resume or derogate from his own grant. Broom's Leg. Max., 45*.

The same restriction binds the legislature.

Territt vs. Taylor, 9 Cr. 50; Town of Paulet vs. Clark, 9 Cr. 292; Leavenworth &c. R. R. vs. United States, 2 Otto, 745.

Prior appropriations are excepted by implication. Wilcox vs. Jackson, 13 Pet., 498.

Even if the act of June 8, 1872, confers a mere right to select a way, and vests it only from the time of selection, this mere right is property, which can no more be alienated to others, or resumed or impaired by subsequent enactment, than can the fee itself.

Soulard vs. the United States, 4 Pet., 511; Teschmaker vs. Thompson, 18 Cala., 25; Chesapeake Canal Co. vs. Balt. Railroad Co., 4 G. and J., 1; Packer vs. Sunbury R. R. Co., 19 Pa. St., 214.

The case of the Chesapeake Canal Co. vs. Baltimore &c. R. R. Co., supra, is, in all material respects, this case. The line was no more a fixed and certain line than that of the Denver & Rio Grande Co.; yet the Court held that the right acquired by the charter to build, was above legislative invasion.

The act of Congress conferred upon appellant the right to locate and construct its line of railroad at any time within five years—afterwards extended to ten. (Acts 44 Cong., 2 Sess., Ch. 126.)

Even if the right granted was the mere right of selection, the whole of the period fixed was allowed to us in which to make that selection.

The decree of the Circuit Court, in effect, declares that no time whatever was given.

IV.

The survey of the appellant through the canon in 1871, *gives it the better right there.*

The survey and staking of a line of railroad, has invariably been held to sufficiently determine and fix the location, and thus render certain the particular lands granted to it, even in those cases where, until location, intermediate pre-emptions and sales are expressly permitted.

Railroad Company vs. Smith, 9 Wall., 95; Union Pacific R. R. Co. vs. The Town of Cheyenne, Copps. Land Laws, 373; St. Paul Co. vs. Haldeman, Id., 384.

While protesting that nothing whatever was required to make perfect appellant's right in the premises, we submit that by no fair interpretation can a greater measure of effort be exacted to fix the mere way, and give a right therein, than had before the grant been exacted in cases where the location of the road carried millions of acres, outside of the way.

V.

By the resumption of its survey, on the 19*th day of April, appellant's right relates back to the date of the grant, for a reason peculiar to the present case.*

At the date of the grant the company was already employed in the work of construction.

If the grant vests only by the construction of the road, still, by relation, the construction is deemed to be complete at the time of its commencement. Wherever, as by the supposition here, several things are required to make a perfect right or title, the last shall receive effect from the date of the first.

Brauley vs. Mullasky, 1 Lest. Land Laws, 380, No. 419; Rice's Pre-emption, Id. 396, No. 404; United States vs. Stanley, 6 McL., 412; Wilson vs. Shackelford, 41 Cala., 630; Stark vs. Barnes, 4 Cala., 412; Murley vs. Ennis, 2 Col., 305; Kelly vs. Natoma Water Co., 6 Cala. 108; Morris vs. Bicknell, 7 Cala., 262; Kimball vs. Gearhart, 12 Cala., 49.

The general depression in all business, and the difficulty of procuring means for enterprises of this character, will excuse the intervening delay.

1 Lest. Land Laws, 396, No. 444; Stainenger vs. Andrews, 4 Nev., 59; Warren &c. Railway Co. vs. Clarion etc. Railroad Co., 54 Pa. St., 32.

VI.

The Canon City & San Juan Railway Company is not a corporation, within the meaning of the act of Congress of March 3, A. D. 1875. (18 Stat., 482.)

It is essential that, claiming the benefits of this enactment, the appellee must show a corporation "*duly organized.*" (§ 1.)

The so called Canon City & San Juan Railway Company never was a corporation.

The act of the Legislative Assembly of Colorado, under which the attempt to organize was made (Acts 1876, p. 41), requires that the certificate shall set forth, among other things, "*the number of trustees of said company* and their names, who shall manage the affairs of said company for the first year of its existence; the name of the town, or place, *and the county in which the principal office of the company shall be kept, and the name of the county in which the principal business of the company shall be carried on.*

This section further requires the certificate to be executed in duplicate, and filed in the office of the Secretary of State, and in the office of the County Clerk of each county. Sec. 2 of the Statute (Rev. Stat., Ch., XVIII.), for section one of which the above is a substitute, provides that "*when the certificate shall have been filed* as aforesaid, * * * the persons who shall have signed and acknowledged the same shall be a body politic and corporate."

The requirements of the Statute are conditions precedent; and the true doctrine seems to be, that in order to confer the benefits of the Statute, there must be a literal compliance with its provisions.

Conditions prescribed to the exercise of a statutory privilege ought not to be frittered away by judicial construction. When the legislature have required several things the courts have no rightful power to say that a part shall suffice.

It must be confessed that some courts have departed from the sound doctrine. Some have asserted that the lawful existence of an association, assuming corporate powers, can never be questioned collaterally.

This, it is believed, has arisen from a failure to observe the distinction between conditions subsequent, for the breach of which the State alone may complain, and conditions of the nature of those now under consideration, which are manifestly precedent, and which, when prescribed in any grant, whether of corporeal or incorporeal things, must be performed in order to investiture.

The distinction is well taken in Frost vs. Frostburg Coal Co. (24 How., 283), where Nelson, J., says, "*inasmuch as no act made a condition precedent* to the existence of the corporation has been omitted, or its non-performance shown, a party dealing with the company is not permitted to set up the irregularity." And in Bank of Auburn vs. Aiken (18 J. R., 138), where on plea of *nul tiel* corporation, it was held that the plaintiffs should have replied specially and shown how they were a corporation, "for the act by which they were incorporated requires certain things to be done before they can be a corporation."

So in Abbott vs. Omaha Smelting Co. (4 Neb., 422), it is said, "the filing of the articles as required, is a condition precedent to the existence of the corporate franchise, or corporate powers

in any respect whatever." So in Bigelow vs. Gregory (73 Ills., 20), it is held that "there is a manifest difference where a corporation is created by special charter, and there have been acts of user, and when individuals seek to form themselves into a corporation under the provisions of a general law. In the latter case *it is only in pursuance of the provisions of the statute for that purpose*, that corporate existence can be acquired."

In Griffin vs. the Clinton etc. R. R. Co., decided in the Circuit Court for the Northern District of Ohio, in 1858, and reported in 1 Western Law Monthly, 31, creditor's bill to enforce the liability of stockholders in the company, upon their subscriptions to stock, was dismissed, because on plea of *nul tiel* corporation, it appeared by production of the certificate of incorporation to be *without seal*. Wilson, J., said, "if one of the statutory requirements is unnecessary, all of them are unnecessary; and the complainant's theory of immaterial statutory requirements, will lead to the legal paradox of lawfully doing that which is by law prohibited."

Utley vs. Union Tool Co. (11 Gray, 139), is a similar case; the purpose of the action being to charge sundry persons with the debts of a concern which, without filing the required certificate at all, had assumed a corporate name. Bigelow, J., said, "there is an absolute want of proof that any corporation was called into being."

Unity Insurance Co. vs. Crane, 43 N. H., 636; Eastern P. R. vs. Vaughn, 14 N. Y., 551; are to the same effect.

So whenever the pretended corporation is assuming to exercise special privileges, allowed only to corporations, *e. g.*, to exercise the right of eminent domain, it is, we believe, invariably held that *any* defect in the organization may be suggested collaterally.

West vs. Bullskin &c., 32 Inda., 138; O'Reilly vs. Kankakee, 3 Inda., 169; Indianapolis Mining Co. vs. Herkimer, 46 Inda., 142; N. & O. R. R. Co. vs. Sullivant, 5 Ohio St., 279; Atkinson vs. M. C. R. R. Co., 15 Ohio St., 21.

It has sometimes been held that a substantial compliance with general laws, allowing the formation of corporations, will suffice

to give corporate capacity. Stated in another form the rule amounts to this: that whatever of substance is specified in the statute, must be set forth in the certificate. Even as thus liberalized, there was no compliance with the statute. In the present case, the requirement to set forth the name of the town and the county where the principal office of the company shall be kept, is wholly disregarded. This provision is of the substance of the act; as is apparent from the consideration that at the same session the legislature prescribed that service of process should be made in that county. (Acts Col. Ter. 1876., p. 105.)

All the world, therefore, were entitled to authentic imformation by the charter, as to where the corporation might be sought for the purpose of service of process.

That such an omission renders the certificate void, upon collateral attack, is settled by Harris vs. McGregor. (29 Cala., 927.)

The omission in the certificate in that case was of "the principal place of business," and the Court held this to mean the principal office; but under the Statute of Colorado, the two can not be considered identical; for both are required to be stated.

It is said in the opinion of Mr. Justice Hallett, that "a railroad company, has no principal place of business other than the principal office."

With submission, the expression is not well considered; the two things being contrasted in the statute, and both required, it is clear that they are different: To say otherwise is to nullify one provision of the statute; or to say that it has no application to corporations formed for the construction of railroads, when the statute expressly makes all its provisions applicable, as well to them as to other corporations.

The phrase "principal office" must, therefore, mean the office at which the governing power of the corporation is exercised—that is to say, where the corporate assemblies are held, and its corporate records as distinguished from shop books, are kept.

In this sense the principal office of the corporation may be and, as matter of fact, often is not only in an adjacent county, but, indeed, in a different jurisdiction from the sole place of business.

Not being a corporation lawfully organized, it was proper to make the individual members of the association parties.

Hill vs. Beach, 1 Beasley, 31; Abbott vs. Omaha Smelting Co., 4 Neb., 424; Bigelow vs. Gregory, 73 Ills., 177.

VII.

The Canon City & San Juan Railway Company is not a bona fide corporation, and is, therefore, not entitled to the benefits of the act of Congress of March 3, 1875.

The answer and cross bill in the first case, and the original bill in the second case, distinctly present this issue, and the allegation is, we submit, fully supported by the testimony.

All circumstances point to this conclusion.

1. The capital stock of the company is fixed, by the articles of association, at $100,000. The line there set forth, as proposed to be built, was fifty-six miles in length. The Canon company pretended to survey twenty miles of this distance in 1877. The surveys consumed $24,000 of the capital stock (fol. 91); the mere cost of grading was estimated, by the only engineer speaking to the point, at $10,500 per mile. Contracting an indebtedness to the full amount of the capital, beyond which they were impliedly prohibited (Rev. St. Col. 1868, Ch. XVIII, § 25), it would not have sufficed for the mere grading of even the first section.

Fixing the capital at a sum so manifestly inadequate, is the most conclusive proof that the professed objects of the corporation were never honestly entertained.

2. So far as appears by the record, up to the time when the present controversy arose, nothing had been done towards the accomplishment of the ostensible purposes of the corporation, except to cause a survey with a view to occupy the line.

There is no evidence that one dollar had ever been paid into the treasury of the company. The stock had been subscribed but a short time previous to the taking of the testimony in July (Evidence fol. 119). Those who had been most active in forming the company, held but nominal amounts of stock (fols. 10, 11, 66, 91, 92), and for this, so far as appears, neither of them

had ever paid anything. The company had not a single engineer or laborer in its employ (Evidence fol. 110).

3. It is very plain that, with the connivance of all concerned, the Atchison, Topeka & Santa Fe Company was the active and controlling power, in what was being done in the name of this factitious corporation.

Up to the time when the Rio Grande Company sent its engineers and working party to resume work, no resolution to build, or attempt to build, had been taken; no engineer appointed, no estimate of expense made (Evidence fol. 21), no arrangements made for borrowing money, or for the construction of the road (Evidence fols. 9, 10, 65). On the 10th of April, at the time of the meeting of the trustees, a Mr. Thatcher had indulged in private conversation which satisfied the President that "*they* were going ahead to build" (94), which singular expression the President explains to mean, his company.

On the morning of the 19th of April, one Morley, not in the employ of the company for a long time previous, (Evidence fol. 108), appeared in the streets of Canon City, and announced to the Treasurer—who seems to have been the active man of the concern,—that the company *wanted to commence* work that day. The Treasurer, thereupon, without further action of the directors, sets himself in motion; rallies the store clerks (49) and loungers of the village, and thirty men are set at work on that day (114).

On the afternoon of the same day, one Robinson, the Chief Engineer of the Atchison Company, who, though never before nor then in the employ of this company, had come there without orders from any one, to take charge of the work of construction (465), is found in the canon claiming that the Denver & Rio Grande Company are trespassing upon the right of way of the Atchison Company (Evidence fol. 207). On that night the directors of the Canon Company are convened, and the farce of electing Robinson and Strong,—Chief Engineer and Manager of the Atchison Company,—to the same positions in the so-called Canon Company, is gone through with.

Thereupon, Robinson assumes the entire direction; advertises for laborers and ties, in the name of the Atchison Company (Evidence fol. 30); lets contracts without consulting the direc-

tors (85); furnishes the money (70), the source of which even the chief officer of the Canon Company was ignorant of (fols. 71, 73). When interrogated as to the present means and future purpose of the company, the directors could only answer hypothetically. The Atchison and Topeka Company send forward laborers from the main line of their road in Kansas (239, 245, 277); and the Treasurer of the so-called corporation devotes himself to a news paper correspondence, announcing the successes of the Atchison, Topeka and Santa Fe Company.

The testimony upon this point was extracted from the most unwilling witnesses, and we respectfully submit that it fully sustains the averments of the appellant.

A corporation formed, not for the purpose of building a railroad, but to occupy the way and prevent others from building, is certainly not entitled to the benefits of the act of Congress.

VIII.

The Canon City Company take nothing by their survey and map, because not a compliance with the act of Congress of March 3, 1875.

The act (18 Stat., pt. 3, p. 482) provides: § 4. That a profile of each twenty mile section of the road shall be filed with the Register of the Land Office, within twelve months after location, if upon surveyed lands, and if upon unsurveyed lands, within twelve months after the survey thereof by the United States; and when approved by the Secretary of the Interior, "*the same shall be noted upon the plats in said office;* and thereafter all such lands over which the right of way shall pass, shall be disposed of subject to such right of way."

1. The act contemplates an actual location of the line on the ground; the survey of the Canon Company, for a portion of the line, was a mere chamber survey, deduced from an entirely different line (Evidence fol. 308); in places the line was not run at all, and no stakes were set; in other places they were set in the ice, and were carried off by the first freshet (Evidence fol. 304).

2. The evident purpose of the act is to enable every subsequent purchaser of the land from the government, to know precisely

what part of the tract purchased by him is burdened with the easement.

To accomplish this, it is manifest that the map must contain data sufficient to a correct transcription of the line upon the tract books in the Land Office; and to enable any one interested to find and follow the line.

. This is especially so, if, as held below, it need not be actually marked on the ground. The map, therefore, ought to have had entered thereon the field notes. Convers vs. Grand Rapids & Inda. R. R. Co. (18 Mich., 466), is an analagous case. The statute required "a map and survey" of the line to be filed in a public office, in order to entitle the company to take the land by condemnation.

The phrase was held to import "such full and accurate notes and data as are necessary to furnish complete means for identifying and ascertaining the precise position of any part of the line, with courses and distances throughout."

Nothing of the sort was done here.

The Register of the Land Office, in order to enter this line upon the tract books, must first determine the point of commencement by the application of instruments, first to the plat filed, then to the tract book, reducing the scale to correspond with the scale of the latter; this point being determined, he must next locate in the same manner the line for the first course run; and so for each successive course. At each step infinite liability to error is involved from the possible variation of the instruments used in the Land Offices, from those used by the original draughtsman, and the extreme probability of inaccuracy in the application of them to the one map or the other.

It is manifest that the slightest inaccuracy in the mechanical process of transcription, either in respect to locating the point of commencement, or the length or direction of any single course run at the foot of the canon, or in that neighborhood, will occasion a very wide departure from the true line at the upper part of the canon. Each error will propagate itself indefinitely in accelerating ratio.

Such a method of locating the line gives subsequent purchasers no protection whatever; the line indicated by the map may be

in one place; that in the tract book in another. The two are more likely to be at variance than in agreement.

3. At the time of this survey, none of the lands within the canon had been sub-divided (Evidence fols. 317, 420, 433). But the act of Congress contemplates that the platting of the line shall follow and not precede the land surveys; it neither requires nor permits the platting and filing of a map of the railroad prior to the public land surveys. A map filed anterior to the public surveys is entirely unauthorized, and confers no right unless, nor until followed by actual construction commenced and diligently pursued. More than twelve months had elapsed between the completion of the survey of the Canon Company, so far as they made one, and the commencement of this controversy, in all which time not one act had been done towards construction. The ground designated by their map was, therefore, as free to us as if the survey and map had never been made, and being the first comer we are to be preferred.

IX.

The case stated and proved, is a proper case for injunction.

Comw. vs. Pittsburg R. R. Co., 24 Pa. St., 159; Packer vs. Sunbury &c. R. R. Co., 19 Pa. St., 211; Warren &c. R'y Co. vs. Clarion etc. R'y Co., 54 Pa. St., 30; Works vs. Junction R. R. Co., 5 McL., 425; Denver &c R'y Co. vs. Denver City R'y Co., 2 Colo., 684; Newburg Turnpike Co. vs. Miller, 5 J., Ch. 101.

X.

The Court erred in excluding proper and competent evidence offered on the part of the appellant.

It is supposed that the production of testimony in the manner adopted in this case, is permitted by Equity Rule 67. *In re* Clark, (9 Blatch., 372). In *Blease vs. Garlington* (2 Otto, 7), it is said that if testimony is offered and rejected by the Court at the hearing, it must still be sent here with the record, subject to the objection. This is precisely what the Court refused. The Court,

we submit, erred repeatedly, not only in rejecting material testi mony, but in refusing to permit it to be reduced to writing.

For all which errors we respectfully submit that the decree of the Circuit Court ought to be reversed.

HANSON A. RISLEY,
WELLS, SMITH & MACON,
for Appellant.

IN THE SUPREME COURT

OF THE UNITED STATES.

At October Term, A. D. 1878.

THE DENVER & RIO GRANDE RAILWAY CO., *Appellant,*

vs.

EBENEZER T. ALLING, *et al.*, *Appellees.*

THE CAÑON CITY & SAN JUAN RAILWAY CO., *Appellees,*

vs.

THE DENVER & RIO GRANDE RAILWAY CO., *Appellants.*

May it please your Honors

As the argument of other counsel sets forth a full statement of the case, it is thought unnecessary to repeat it here.

The vital question at issue in an enlarged sense seems to be whether the acts of Congress vest in the complainant an unqualified grant of the right of way over the public

domain from Denver to the southern boundary of Colorado, in the valley of the Rio Grande, and thence down the valley of the Rio Grande, through New Mexico, to El Paso in the State of Chihuahua.

Immediately the question is as to the grant of the right of way through the Royal Gorge or the Box Cañon of the Arkansas River.

Although the entire grant is not directly involved in this discussion, nevertheless it is proposed to cursorily consider the grant as a whole.

Generally parties seeking grants for private purposes draw the bills making them. The grant may be said to be made at the instance of the grantee. And it may be admitted that the rule is that if the language of the grant is ambiguous and uncertain the construction is to be in favor of the government against the grant. Unless the language of the grant is sufficiently explicit and clear to pass every thing that it is claimed was intended, in the language of Mr. Justice CATRON (*The Dubuque & Pacific R. R. Co.* v. *Litchfield, 23 How., 66*), "It is their own fault," that is, the fault of the parties seeking the benefit of the grant.

In considering the act of Congress granting the right of way to the complainant, approved June 8, 1872, 17 U. S. Statutes at Large, p. 339, it will be observed that all that part of the act bearing upon the questions now to be considered is as plain and explicit as words can make it. The act begins with the words: "That the right of way over the public domain, 100 feet in width on each side of the track, together with," etc. * * * and then goes on

says, "be and the same are hereby granted and confirmed unto the Denver and Rio Grande Railway Company."—and to show the intent of Congress in making this grant, and to render it certain that the grant should never be questioned because of the want of capacity of complainant to be endowed with the grant (it being a corporation under territorial law), the act goes on to ratify and confirm to the complainant, its successors and assigns all the rights, powers and franchises conferred by the incorporation laws of the Territory of Colorado.

The object of Congress is plainly to be seen throughout the Act. It was to secure to the complainant the undisputed exercise of all its supposed corporate powers, rights and franchises, under the territorial law, and to endow it with the grant of the right of way over the public domain, so that the complainant in presenting its scheme to capitalists, of whom the necessary funds for the construction of the road were to be obtained, might be enabled by plain law, to convince the holders of capital that its corporate rights, powers and franchises, could never be questioned, and that It had a vested and unqualified right of way over all the public domain covered by its charter, and so secure the construction of the road, which was the grand object of Congress in making the grant.

That this was a grant *in presenti* will not be questioned, for it is established by a multitude of decisions.

Schulenberg v. *Harriman, 21 Wallace, 44.*

Leavenworth, &c., R. R. Co. v. *United States, 2 Otto, 733.*

That the grant is paramount and must over-ride all subsequent grants and dispositions of the public domain, along the designated route, whether to individuals or cor-

porations, is also true. It was so decided by Mr. Justice FIELD, in Nevada, in construing the grant to the Central Pacific Railway Company, which is like this.

Central Pacific R. R. Co. v. *Dyer, 1 Sawyer, 941.*

Yet this particular claim may not be without qualification. The right to construct over a particular tract or place may be lost by act of the grantee, or by omissions of the grantee to assert its right in proper and due time if its conduct is such as to create an estoppel, by deed or *in pais.*

And here the exact point is made, that unless the complainant has released by deed, or has so conducted itself as to create an estoppel *in pais*, its right to two hundred feet in width of the public domain lying in the course of its chartered route, to be adopted as it progresses with its road, is absolute, without let, hindrance or molestation, from any party, corporate or otherwise.

The grant does not confine the complainant to the travers ing of any particular tract or tracts of land, except the Arkansas Cañon, and of that more hereafter.

Some confusion has arisen in failing to observe the dis tinction between private and public grants. Private grants require the possibility of present identification of the property granted, in order to make the grant valid. Legislative grants do not. The rule is exactly and succinctly stated by Mr. Justice FIELD in the case of *Schulenberg* v. *Harriman, supra.* He says:

"The rules applicable to private transactions, which regard grants of future application—of lands to be afterwards designated—as mere contracts to convey, and not as actual conveyances, are founded upon the common law, which requires the possibility of present identification of property to the validity of its transfer. A legislative grant operates as a law as well as a transfer of the property, and has such force as the intent of the legislature requires."

Here, then, is an express definition of a legislative grant, and an ultimate and conclusive decision upon such grant. A decision which this Court will not disregard or question, and pondering upon it, this Court will not fail to observe that the decision of Justice FIELD, in Dyer's case, *supra*, was in strict accordance with the law afterwards declared by the whole Court in Schulenberg's case.

The question, then, may be said to be *stare decisis*, and further argument upon it superfluous.

Referring to our former remark about an estoppel, it is supposed that if the complainant company should release to another company all its rights to construct its road over a certain tract, or should find another corporation constructing a road along its chartered line, and should "stand by," as standing by is understood in legal parlance, and allow such other company to expend money in the construction of its road, it could not afterwards adopt the line of such other company for its line of railroad. In other words, such *standing by* and encouraging the expenditure of money, might create an *estoppel in pais*. But a right of way acquired by grant or deed can never be lost by *non-user*.

Smiles v. *Hastings*, *24 Barb.*, *48*.

We have no such questions in this case. The complainant, upon the first indication from the defendants that they proposed to enter the Arkansas Cañon, to which this controversy is wholly limited, asserted its rights by physically resisting their occupation of this cañon, and promptly appealed to the courts for protection. In all this the action of the complainant cannot fail to meet the approval of courts of justice. It had the right and it was its duty to

resist the invasion of trespassers and intruders into the Grand Cañon, expressly described in the grant of June 8, 1872.

This cannot be successfully questioned; for the charter after describing the route of the road from Denver to Pueblo, upon such line as "may be found, upon a detailed survey to be most eligible for intersecting the same" (viz: the Arkansas River), defines the route of the road to be "thence up the valley of the Arkansas River to a point at or near Cañon City, *thence continuing up the Valley of the Arkansas through the big Cañon of the same*, to a point at or near the mouth of the South Arkansas River."

All the way from Denver to Cañon City, which is at the mouth of the "Big Cañon," precision was to be given to the grant by "detailed survey," but from Cañon City through the "Big Cañon" no survey was required to give precision to the grant.

It is admitted that this cañon "was and still is through its whole length situate on the public domain; that through the distance of one and one-fourth miles thereof, said cañon was not nor is exceeding forty-five feet in width or thereabouts, and through the same distance the same was and is enclosed by precipitous mountains, two thousand feet or thereabouts in height, and in the course of said cañon through the narrow part thereof, are many abrupt angles and curves."

The popular meaning of the word cañon is "a deep gorge, ravine or gulch between high and steep banks worn by water courses." (Webster's Dictionary).

The charter proposed and designated that gorge of the Arkansas for complainant's route. Congress, by the act

of June 8th, 1872, expressly approved the charter, and so expressly approved this route, and granted the right of way of 200 feet in width through that cañon to the complainant.

That grant covers the adjacent walls of the cañon to an average width of about 75 feet on each side, for it is admitted that the cañon is only about 45 feet wide.

In many of the grants by the United States there remains some thing to be done to give precision to the grant. Notably, grants of the 16th and 36th sections to States for school purposes, grants for colleges, and grants to States or corporations for railroad purposes. Grants to States for school purposes have often been found mere floats, until the lands were surveyed; for railroads until the road was definitely located. These questions are discussed in the opinion of Attorney-General Cushing in the Portage City case (*8 Opinions, 265*). The subject under discussion was that of a grant to the State of Wisconsin for the purpose of improving the navigation of the Fox and Wisconsin rivers. That was a grant of land "equal to one-half of three sections in width on each side of the Fox river, and the lakes through which it passes from its mouth to the point where the Portage canal shall enter the same, and on each side of said canal, from one stream to the other," and this was held by the Attorney-General to be a grant defined with reasonable certainty, and with sufficient precision to pass the title to the land without survey. (*See Veeder* v. *Guppy, 3 Wis., 502.*) How much more the grant of the Arkansas Cañon!

Now whether this was a grant of the fee as we claim it to be, upon the authority of *Coburn* v. *Coxeter, 51 New*

Hampshire, 758, or a grant of an easement only, the result is the same, for if it was a grant of an easement, the right to the possession is vested in the complainant.

Bridge v. *Kansas Pacific Railway Co., 12 Kans., 410.*

Same case, 2 Otto, 316.

These decisions are conclusive upon this question.

It only remains to consider the act of Congress of March 3, 1875 (*U. S. Statutes, Vol. 18, p. 482*). That act purports to grant the right of way through the *public lands* to railroad companies, and section 2 provides that any railroad company whose right of way or whose track or road-bed upon such right of way, passes through any cañon, pass, or defile, shall not prevent any other railway company from the use or occupany of the said cañon, pass, or defile, for the purpose of its road, in common with the road first located, or the crossing of other railroads at grade. The third section of the act declares that the legislature of the proper Territory may provide for the manner in which private lands and possessory claims on the public lands of the United States may be condemned. There are several other provisions in this act which may have some bearing upon the case, but not of sufficient importance to be specially noted.

In considering this act, the first question presented is: Is it an act professing to alter, amend or repeal the act of June 8, 1872?

In terms, clearly it is not.

This statute then is to be subjected to the ordinary rules of construction.

We have already attempted to show, and have shown, as we think, beyond all question, that the grant of the Arkansas Cañon to the complainant, by the Act of 1872, was absolute, unqualified and exclusive, leaving nothing to be done by the complainant or the government to give precision to the grant or to make it more definite and certain.

That being so, the two hundred feet in width through that cañon was segregated from the public domain, and was no longer public lands of the United States.

If we are correct in this, if we are standing on solid ground, the act of March 3d, 1875, does not purport to challenge our right, for it only grants the right of way through the *public lands* of the United States.

As long ago as 1839, the Supreme Court (in *Wilcox* v. *Jackson, 13 Peters, 498*), decided that "Whensoever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands; and *no subsequent law*, or proclamation, or sale, would be construed to embrace it, or to operate upon it, although no reservation were made of it."

This decision has become axiomatic in all the courts since that day, never questioned, never doubted, always adhered to, and relied upon as fundamental law.

The rule of law for the construction of statutes is that the legislature, in passing an act, does "*not* intend to make any alteration other than what is specified and besides what has been plainly pronounced."

Potters Dwarris on Statutes, p. 185.

To which is appended a note affirming that this is the rule of interpretation in all our courts, Federal and State.

The decision of the Supreme Court in *Leavenworth &c., R. R. Co.*, v. *United States*, 2 *Otto*, 733, supports the construction of the act which we claim. One of the questions in that case was whether the grant of lands to the State of Kansas embraced land occupied by Indians pursuant to treaty stipulations.

Mr. Justice DAVIS says, that in making such grants "Congress cannot be supposed to have thereby intended to include land previously appropriated to another purpose, unless there be an express declaration to that effect." Farther along he quotes from Bacon's abridgement, "A thing which is within the letter of the Statute is not within the Statute unless it be within the intention of the makers."

It may be said that the words of the second section of the act of March 3d, 1875, are of themselves broad enough to make a grant of the right of way to any railroad company, through the Arkansas Cañon. But in answer to this, we say:

1. That if it should be found to be within the letter of the Statute, it is not within the Statute unless it be within the intention of the makers.

2. That the most that can be claimed for the Statute is that Congress intended to provide a right of way for two or more railroad companies, through a cañon, pass, or defile, if such cañon, pass, or defile, was at the time of the passage of the act, a part of the public domain, and if the same should be sought to be utilized by such companies while it remained a part of the public domain. And this the more clearly so, because by the third section power is

given to the legislature of the proper territory to provide by law for the condemnation of private lands and possessory claims on the public lands of the United States, for the right of way of railroad companies, plainly showing that it was not the intention of Congress to interfere with vested rights.

Whether the defendants can condemn the right of way vested in the complainant, for its road, will have to be considered when such attempt is made.

At present that question does not arise.

If it were necessary we could invoke the unbending rule of law that the sovereign can not revoke, or by law repeal its own grant. A right vested is as safe and sacred against the invasion of the sovereign or the government as it is against an individual. But we need not carry our argument so far.

Congress has not and did not intend to interfere with the right of the complainant. The act of 1875 must be construed as a whole. Taking the 1st and 2d sections of that act together it appears very clearly that the provision in the second section was intended to apply, and does apply only to the companies which might be organized and take right of way in accordance with the provisions of the first section.

The first section provided for the organization of companies in general and gave them a right of way through the public lands.

The second section provided that two or more of such companies might pass through the same cañon.

But this does not apply, and was not intended to apply to

the Arkansas Cañon. That had been previously appropriated to the use of the complainants.

Two hundred feet in width through this cañon was absolutely granted to this complainant in 1872. That grant has been recognized and renewed by Congress on two subsequent occasions. Congress has not attempted to interfere with or revoke the grant in any respect.

The complainant shrinking from the exercise of violence, claims to be protected in its rights—rights which, when thoroughly comprehended, will be found to be as firm and immovable as the mountains in which they are located.

J. P. USHER,

Solicitor for Complainants.

SUPREME COURT

OF THE UNITED STATES.

THE DENVER AND RIO GRANDE RAILWAY COMPANY, *Appellants.* vs. EBENEZER T. ALLING AND OTHERS, AND THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *Appellees.*	BILL FOR INJUNCTION.
THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY, *Appellees.* vs. THE DENVER AND RIO GRANDE RAILWAY COMPANY, *Appellants.*	BILL FOR INJUNCTION.

APPEAL FROM THE CIRCUIT COURT FOR THE DISTRICT OF COLORADO.

ARGUMENT FOR APPELLANT.

By JAMES GRANT,

For the Denver & Rio Grande Railway,
Appellants.

SUPREME COURT.

THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY,
vs. *Appellees.*
THE DENVER AND RIO GRANDE RAILWAY COMPANY,
Appellants.
} IN EQUITY.

THE DENVER AND RIO GRANDE RAILWAY COMPANY,
vs. *Appellants.*
EBENEZER T. ALLING AND OTHERS, AND THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Appellees.
} IN EQUITY.

APPEALS FROM THE DISTRICT OF COLORADO

These two cases are appealed together; were tried and argued together in the court below, and are now heard by agreement together, as they both relate to the same subject.

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Chapter of the Revised Statutes, and acts amending the same, and by signing articles and filing them in the proper State offices, and makes a profert of its charter.

That it was incorporated to construct a railroad between Cañon City, in Fremont county, and the point known as South Arkansas post office, in Lake county; commencing at a point to be selected in Cañon City, thence up the valley of the Arkansas, through the Grand Cañon, thence by the most practicable route, following the Arkansas river to a point known as South Arkansas post office.

That in the month of April, 1877, the plaintiff surveyed and located the line of its railroad over said route, by a line of stakes, and forthwith proceeded with the construction of said road, one part of which is at the entrance of the Grand Cañon, and the same has ever since been in possession of the plaintiff.

That it has complied with the laws of the State, as set forth in its articles, and to secure its right of way, and other rights, under the act of 3d of March, 1875, entitled, "An Act granting the right of way to railroads through the public lands," made a survey and located its line, caused a plat and profile of said road to be made and filed with the Register of the Land office, where such line is located, within twelve months after the survey, and procured the approval of the Secretary of the Interior, and caused said plat and profile to be noted on the plats of the land office, as by said act required, and has acquired the right of way one hundred feet wide on each side of the center of its track over said line of survey and plat, and is now in possession thereof.

That at the time of survey, locating and platting of said line, the lands over which it was located were public lands of the United States, and no part was within any military park or reservation.

The omission to aver filing a copy of articles of incorporation on demurrer, was supplied by amendment.

Record. Folio 232. Record 92, top of page.

That the Denver and Rio Grande Railway Company, claiming to be a corporation under the laws of Colorado, on or about the 19th of April, 1878, after the plaintiff had taken possession of said line of road, and after approval of the plat and profile, entered upon and invaded the possessions of the plaintiff with a large number of men, and commenced to throw down and destroy the graded portion of the Plaintiff's road bed and with intent to hinder the Plaintiff from constructing the same, pull up the stakes, and removed them, and established a different grade, and are now threatening to remove the stakes and grade pegs, and to take possession of the line and exclude the Plaintiff therefrom.

That the Plaintiff's located line is twenty miles long, and for a part of the distance through the Grand Cañon of the Arkansas, that the same is very narrow and enclosed with precipitous rocks, the difficulties of establishing a grade through it is very great, and if Defendants succeed in doing what they threaten to do, will put the Plaintiff to great expense.

That Plaintiff had a large number of men employed—several hundred—ready to build its road, and if Defendant is allowed to proceed will hinder and delay the building of the road in 1878.

That defendant has a large number of men with fire arms and ammunition, and threatens to shoot the plaintiff's servants if they attempt to hold possession of the work, that the nature of the Grand Cañon through which the road passes, is such, that the plaintiff's servants can't go on under the threats of shooting by the defendant's servants, and these threats prevent plaintiff from work, and in the nature of things it is impossible for plaintiff to establish his damages by an action at law;

and if defendants are allowed to proceed it will put plaintiff to great expense in reconstructing their grade, and defendant is insolvent.

That the defendants have never acquired the right of way over the plaintiff's line, and prays for an injunction and relief.

Exhibit A is the plaintiff's articles of incorporation. The map of the plaintiff is not a profile, but a lineal map, approved on the 22d day of June, 1877. As we can't copy it (the map) in the brief, we shall have to trouble the Court with a reference to it. The amended bill was filed May 9, 1878.

Answer of defendants, filed June 12, 1878, folio 301, says:

The defendant denied that the Cañon City & San Juan Co. was a lawful corporation, since the 17th of February, 1877, or that it was lawfully incorporated at any time.

Admits that Alling and his associates pretend to be a corporation by virtue of their certificate.

Admits that at the time mentioned, after claiming to be a corporation, the Cañon City & San Juan Company, at the instance of the Atchison, Topeka & Santa Fe Company, procured the survey of some part of the named route, but denies that they surveyed or located the whole of it, and avers that the President of the Atchison, Topeka & Santa Fe pretended that they did not intend to invade the Denver & Rio Grande route.

Avers that if any survey was made, it was in the winter season in the narrow part of the cañon; if any stakes were set, they were upon the ice, and were necessarily carried away in the following spring (1878).

Denies that the plaintiff proceeded with all practicable dispatch to construct the road on the line named in the certificate.

Denies that the plaintiff did any grading; denies that the plaintiff was in possession.

Admits filing a plat with Land Officers and the approval of the Secretary of the Interior, but denies that it was such a plat or profile as was required by law, or that it showed the location of the road in relation to sections.

Denies that plaintiff acquired any right of way, as alleged, or are legally possessed thereof, or any part thereof, through the public domain of the United States.

That after said plat and profile was filed with the Register it was withdrawn by the plaintiff and is retained by him.

Admits that defendant claims to be and is a corporation under the laws of Colorado and the United States.

Denies entering on any part of the line of railroad claimed by the Plaintiff.

Admits that the line of railroad named by Plaintiff, for a part of the distance of twenty miles runs through the Grand Cañon of the Arkansas.

Admits that it is very narrow, and the difficulties in the way of survey and grade through it are very great.

Denies that Plaintiff has a large number of men at work on the same, or that the Plaintiff was ready to proceed to the construction of said line.

Admits that Defendant had a large number of men, and that some of them were armed, but solely for self-defense against the assaults of the A., T. & S. F. Company.

Denies any threat by Defendant's employes to shoot the Plaintiff's employes; but admits that the force was intended to defend defendants against any attempt to exclude them from their own lawfully occupied line.

Admits that Defendant's servants prevented A., T. & S. F. Co. from working in the Grand Cañon, then and always before in the absolute and exclusive possession of the Defendant, and prevented them from going through the narrow cañon.

Admits that the part of the same occupied by the Defendants is the narrowest part of the cañon, where the great part of labor and longest time would be required to construct Defendant's road.

Denies all allegations that Defendant has no right to the cañon.

Says that on October 27, 1870, the Defendant became a lawful corporation, called the Denver & Rio Grande company, and its object was to locate, construct and operate, and maintain, among others, a railroad beginning at Denver, thence to a point on the Arkansas at or above Pueblo, thence up the valley of the Arkansas to a point at or near Cañon City, thence up the valley of the Arkansas, through the Big Cañon of the same to a point at or near South Arkansas, etc.; that said company was by virtue of its organization under the laws of Colorado, and acts of Congress, a lawful corporation; that on June 8, 1872, Congress passed an act granting the right of way through the public lands to the Denver & Rio Grande railway company, giving to said company the right of way over the public domain, one hundred feet in width on each side of the track, together with such public lands adjacent thereto as might be needful for depots, shops, and other buildings for railroad purposes, and yard room, and side tracks, not to exceed twenty acres at any one station for ten miles, and the right to take stone and timber from adjacent public lands, and conferring on the company all the rights, powers and franchises conferred by the laws of Colorado on railroad and telegraph companies, provided Defendant should in five years complete its railroad as far south as Santa Fe, and should complete fifty miles in each year thereafter, and providing that the grant should be null and void as to the unfinished portion of the road; that Congress on March 3, 1875, passed an act "to correct a clerical error in the act granting the right of way through the public lands to the Denver & Rio Grande railway company," again recognizing the Defendant as a corporation, with the powers,

privileges and franchises conferred by the laws of Colorado, thereby expressly ratified, and that Congress, by an act on the 3d of March, 1877, entitled "An act to amend an act granting the right of way, through the public lands, to the Denver & Rio Grande railway company, approved June 8, 1872," enacted that the period of five years was extended to ten years from the passage of the first named act.

That at the date of the act—8th of June, 1872—the Big Cañon of the Arkansas was, and still is through its whole length public domain, a distance of one and a quarter miles not over forty-five feet wide, and is enclosed by precipitous mountains two thousand feet high, and in the course thereof is a place called the box cañon. In the box cañon part of the Royal Gorge are many abrupt angles and curves so that only one road could be built through there except by one track crossing the other at many places and constant danger in operating trains, all of which was known to Congress, and the people of Colorado, and the Plaintiff.

That relying on its franchises and privileges, and especially the grant of the right of way through said Big Cañon, which was by reason of the facts an exclusive right, the Defendant in 1871 and 1872, having located its road from Denver to Pueblo and the same being in the course of construction, did survey and locate its railway by the route mentioned in its charter from Pueblo to Cañon City and from Cañon City through the Big Cañon of the Arkansas, and through the whole length, designate its line by substantial stakes, such as are commonly used in such cases, at the end of each one hundred feet, and at the upper end of said Big Cañon, and the narrow part or gorge, did erect retaining walls, and excavate, fill, grade, and build in a permanent manner the bed and grade of its railway for about four hundred feet, which has since remained; and said grade, structure and stakes have ever since afforded notice to the whole world of their survey and location through the cañon, and of the Defendant's intention to build

there; all which was known to the Plaintiffs. And about 1875, this Defendant completed its road from Pueblo to Cañon City, two miles from the Cañon, having previously finished it from Denver to Pueblo. That from Cañon City to the mouth of the South Arkansas, there is but one practicable route for the building of said road, and that is through the Cañon. That there is no road to Cañon City except the Defendant's.

That Defendant has always intended to build its line through the Big Cañon, and on the 19th of April, 1878, began to and did resume the construction of its road, according to its charter, through the Cañon, and when about to go to work the Atchison, Topeka and Santa Fe railway company, in the name of the Cañon City and San Juan company, pretending that the latter was to locate and build a road through the Cañon, and to injure the Defendant, and to anticipate and prevent it from occupying the Cañon, or other purpose, began to locate and construct the grade of a road with a large force, from Cañon City toward the Arkansas Cañon, and through the open portions of the Big cañon below the Gorge or narrow part thereof, and did begin to locate and construct a road along the same line located, staked and designated by the Defendant and occupied the same while this Defendant was still occupying the narrow part or gorge of the Cañon, and while Defendant was endeavoring to re-occupy the part unlawfully occupied by the Atchison, Topeka and Santa Fe company as it lawfully might; and these are the supposed grievances of the Plaintiff, and no other.

That the Atchison, Topeka & Santa Fe Co. was acting solely for itself and not for the Plaintiff. That the latter corporation has no stock subscribed, nor other means to build five miles of road, and cannot build it and the Atchison, Topeka and Santa Fe company is building the line of the Cañon City and San Juan company.

That the Atchison, Topeka and Santa Fe company have changed the line in places a distance of one hundred and twenty-five feet from their surveyed line.

Denies allegations of insolvency, and avers that the Denver and Rio Grande company have perfected money arrangements to build the road from Cañon City to the South Arkansas.

To this answer a replication was filed

Record folio 376 and 147, top of page.

CROSS BILL.

On the day of filing answer, July 12, 1878, the Denver & Rio Grande Railway company filed a Cross Bill, (record folio 236, page 75,) setting forth as grounds for relief, the same facts set up in their answer.

That their right of way under the act of June 8th, 1872, and the subsequent acts, was complete, and that their survey, location and staking through the Big Cañon made specific and distinct their right of way under the Act of June 8th, 1872, and that they had built the road up the Arkansas valley to Cañon City in 1875, and were proceeding to build it through the Cañon on 19th April, 1878, when the conflict arose which is to be settled by these suits.

The Cross Bill prayed for an injunction to restrain the adverse party from interference with the right of way of the Denver & Rio Grande company.

A motion was made to dismiss the cross bill (record folio 380,) and on 12th August, 1878, (record folio 381,) the Court ordered dismissal.

THE SECOND CASE.

THE DENVER & RIO GRANDE RAILWAY CO.)
vs.
EBENEZER T. ALLING AND OTHERS.)

A bill filed in the U. S. Circuit Court against Ebenezer T. Alling and others, directors in the Cañon City & San Juan Railway company, various persons acting for the Atchison, Topeka & Santa Fe Railway company, setting forth the substantial facts alleged in the answer to the foregoing bill of the Cañon City & San Juan Railway company: that the Denver & Rio Grande Railway company was organized under the laws of Colorado, made a corporation under the laws of the United States by Act of June 8, 1872, perfect and complete, by their survey and location from Pueblo to Cañon City and through the pass and construction to Cañon City in 1875, and their commencement of work on 19th of April, 1878, &c.

That the Atchison, Topeka & Santa Fe company, using the name of Cañon City & San Juan company, were without law, obstructing their construction and interfering with their right of way, and there was no room in the pass for two roads.

Bill filed 17th of April, 1878, subpœna to June Rule day.

The Defendants, Alling, Strong, Robinson, and the Atchinson, Topeka & Santa Fe Railway company, answered setting up as a defense the right of the Canon City and San Juan company to the pass under their charter, the General Right of Way Act of March 3d, 1875, and the map approved by the Secretary of the Interior in answer, folios 221, 275, 290.

Replication was filed folio 304.

The proofs were taken to be used in both cases. The causes were submitted on the pleadings and proofs.

The Court, in their record, folio 122, gave an opinion ordering a temporary injunction against the Denver & Rio Grande company, holding that the Canon City and San Juan company had the superior right to the pass, and allowing the Denver & Rio Grande company only a secondary right, and on final hearing dismissed this bill, folio 646, and appeals were prayed and allowed.

EVIDENCE.

A stipulation was made that the map of right of way claimed by the Canon City & San Juan company was entered on the plat of the local office at Pueblo.

A great deal of oral testimony was taken in the cause, which in the views presented by us, was not material to the rights of the parties about the solvency and stock of the two companies, prospects of business, and other things.

The Plaintiffs, the Denver & Rio Grande company, proved by Megrue, Alling and others, (folio of evidence 17,) that the work for the Canon City & San Juan company was begun by the Atchison, Topeka & Santa Fe company on 19th of April, 1878, by Mr. Robinson, chief engineer of the Atchison, Topeka & Santa Fe company. Folio 31.

Holbrook (record of evidence, folio 130,) surveyed and platted the line for the Canon City & San Juan company, (the date he does not state, but it must have been after their charter in 1877,) and he surveyed and marked the line through the canon.

McMurtrie, (folio 147), chief engineer of the Denver & Rio Grande company, testified that he made a survey of the Denver & Rio Grande route through the canon in January and February, 1871. He continued this survey in January, 1872, (folio 149,) between four and five miles; he put in stakes every hundred feet, and sometimes oftener. He surveyed from Canon

City to the bridge at McCandles' Park, now called Twelve-Mile Bridge, and in 1872 continued it for five miles further. On the 19th of April, 1878, began and surveyed up the canon three miles, until stopped by the Court, and after the Court made a decision he completed the survey to South Arkansas and continued it on since that time. He made these surveys in 1871 and 1872 for the Denver & Rio Grande company, and reported to Greenwood, who was, in 1871, chief manager.

On 19th of April, 1878, he saw a few of the stakes he had set in 1871, in the lower end of the canon. In the Royal Gorge he saw a number of them still standing in the rocks above high water. That below the Royal Gorge he found a new line of stakes, but in the Royal Gorge he found none but his own stakes set in 1871 and 1872. In 1878 his survey was about on the same ground as in 1871-2. In February, 1872, he set men to work in the canon. They put up a few hundred yards of masonry, and graded a road bed partially from three to five hundred feet. He set stakes for the work, and directed a man named Workheiser, who went with him in his survey, to superintend the work. The work was done right in the upper end of the Royal Gorge. He made a plat and profile of his work in 1871, and it is now in his office. There is no other practicable route for a road except through the Grand Canon and up the Arkansas Valley.

Was at Canon City on 19th April, 1878, between ten and eleven o'clock; towards evening saw Mr. Robinson, Chief Engineer of the A., T. & S. F. Co., near the mouth of the canon. He was coming out of the canon with Mr. Holbrook.

Witness identifies the profile and map of his survey made in January, 1871, covering nine and a quarter miles; explains the difference between a profile and map; one shows the cuts and fills, the other the alignment. The map was returned to Greenwood. Offered to show field notes and says the curvature of the road could be platted in office, without going on the

ground; to build the road, would take the map or copy, go to the field, put in the stakes with an instrument as marked off on the map. The stakes have got to be put in before work is done, and an engineer could keep ahead of constructors, putting in the curves. The nine and one quarter miles began at Cañon City bridge, and extend up to what is now called Twelve-mile bridge, and would extend three and two-tenths miles above the Royal Gorge.

Two roads can be built in the Cañon by paying money enough, at a difference of cost of $150,000 to $200,000.

The cost of building the road on the surveyed line of 1872 at present prices is ten thousand five hundred dollars per mile for grading.

James R. De Remer, testified—Folio 205—that he has for several years been assistant engineer of the Denver and Rio Grande Railway company, and went through the Cañon on the 19th of April, 1878. On coming out in the evening met Robinson, chief engineer of the Atchison, Topeka and Santa Fe company, and Holbrook in a buggy, and Robinson wanted to know what we were doing on their right of way—A. T. & S. F. company. I told him I did not know he had any there. He said they had their survey and plat filed. On the 19th of April found stakes for two different surveys, one much older than the other; only one set of stakes in the Royal Gorge; found twenty-five or thirty stakes of the old survey in the Gorge. After the 19th of April completed a survey clear through the Canon from the head of the Royal Gorge, up to McCandless' bridge; found only one set of stakes above the Gorge—two or three old stakes. Since the 19th of April, I started at mouth of Grand Cañon, crossed the river, went up Grape creek as far as Sand creek, crossed the Divide between Sand creek and McCandless' Park, run down McCandless Park to Arkansas River and went back; completed the survey through Grape creek cañon to the head of Pine creek, and down Texas creek to the Arkansas river, and from

Texas creek over to Oak creek, and down Oak creek to Arkansas river. These routes I do not consider practicable.

On tne 19th of April, 1878, I took the first gang of men into the Royal Gorge. On that day and the next I went nearly through it. I saw the old stakes the morning I got there, on the 19th, between five and six o'clock in the morning.

CROSS EXAMINATION.

I swam the river and took possession of the Royal Gorge with a party of men before five o'clock on the morning of the 20th of April, when no other party was in possession. I have surveyed the route through the entire canon and Royal Gorge. I assisted McMurtrie in a survey above the canon in 1872. At that time I was not in the canon.

Joseph Brewster—Record of evidence, folio 227—In January and February, 1872, I assisted McMurtrie in making a survey of the Grand canon; surveyed over nine miles of the same; began at Canon City and went to McCandless Park. He placed stakes along the line, about one hundred feet apart.

Joseph E. Carter testified—Folio 237—He was foreman of the Atchison, Topeka and Santa Fe company, and was employed about the canon sometime between the 20th and 24th of April, 1878. Had fifteen foremen and each foreman fifteen or more men under him at work, in and about the Grand canon of the Arkansas.

Alexander Thornton, folio 257, testifies that in May, 1871, he did some small amount of work, grading and laying up stone wall in the Grand Canon for the Denver & Rio Grande railway company; worked, according to figures on the stakes under a foreman named Workheiser.

W. J. Robinson, folio 264, testifies to the same facts; worked with Thornton and Pringle; built walls; Workheiser

showed them where to work; had been work done there during the winter before.

Robert F. Weitbrec, folio 271, testifies that he was Treasurer of the Denver & Rio Grande company; that the Union Contract Company was employed to build the railroad for the Denver & Rio Grande company, under written contracts under the officers of the Denver & Rio Grande company. The men who were brought there by the A., T. & S. F. Co. to work in April, 1878, were sent, as Strong said, from the section men and other track laborers of the A., T. & S. F. Co.

H. R. Holbrook, engineer, testified for Defendant, folio 292, that he was chief engineer of San Juan railroad; made a survey for twenty miles west from Canon City, through the canon, and put down stakes every 50 to 100 feet; prepared a profile; surveyed through the Royal Gorge; made survey in the Spring of 1877; made report to San Juan company. When he surveyed he found a few stakes of an old survey; prepared a map for the Secretary of the Interior; field notes of alignment on it. The notes of the alignment (course and distance) "are not on the map;" saw the old stakes and work done there, about the center of the canon. The road located by him runs over the same line as the line of the work he saw in the canon done before, and would come within the San Juan right of way. When he made his survey he began in February and finished in April, 1877. He had heard that the Denver & Rio Grande company had made a survey through the canon.

William H. Greenwood, for defendant, folio 361, testified that he was General Manager of the Denver & Rio Grande company from 1870 to 1875; that in 1871 he caused the survey by McMurtrie through the Grand Canon of the Arkansas to retain control of that canon for the Denver & Rio Grande company, which had several lines of road to construct, and their intention was to construct all the lines as fast as they could get money to build them. The original intention was to build from Denver to Pueblo, thence up Arkansas to Puncho

pass. I know that work was done in the Grand Canon of the Arkansas, and the intention was to do enough work through the canon to keep the right of way through the canon, as we were afraid some other parties might enter in there and give trouble in the construction. Witness was engaged for the Canon City and San Juan company.

T. S. Brandegee, an engineer for Defendant, folio 416, testified that he assisted Holbrook on his survey in 1877. Township lines were then run, but not subdivision lines; saw a few old stakes and work done in the canon prior to Holbrook's survey; room for two roads in the canon; cannot tell difference in the cost.

Charles E. Gast, for Defendant, folio 442, testified that he procured the approval of the map by the Secretary of the Interior, Exhibit No. 1. By letter of Commissioner of land office, folio 523, this map was approved June 22, 1877.

A. A. Robinson, for Defendant, folio 446, testifies that there is room for two roads in the canon; made no careful estimate of the difference in cost; formerly testified that only one road could be built; has changed his opinion, because they could encroach on the river; *the narrowest place is about 40 feet.* The Plaintiffs proved their charter. The Defendants filed the map approved by the Secretary of the Interior, and the correspondence shows the date of approval.

ASSIGNMENT OF ERRORS.

THE COURT BELOW ERRED.

First—For rendering a decree in favor of the right of the Canon City and San Juan company to build on the Appellant's right of way, through the Big canon of the Arkansas.

Second—The Court erred in dismissing the Appellant's Cross Bill.

Third—The Court erred in dissmissing the Bill of the Denver and Rio Grande Raiaway company *vs.* Alling and others, holding erroneously, in both cases, in favor of the Canon City and San Juan company.

BRIEF

ON THE LAW OF THE CASE.

To make the statutes and law of these cases referred to, more easy of access, we annex to this argument so much of the charter of the Denver and Rio Grande Railway company as relates to the matter in controversy, which is of the date of the 27th of October, 1870:

The Act of Congress granting the right of way to the public lands, to the Denver and Rio Grande Railway company of the 8th of June, 1872.

The general right of way act through the public lands, to all incorporated companies, of the 3d of March, 1875.

An Act to amend the Act granting the right of way to the Denver and Rio Grande Railway company of the same date.

An Act to amend the same of the 3d of March, 1877, extending the time to build the road for ten years, and the third section of Act, 2d July, 1864, granting the right to condemn lands to the Pacific Railroad company and conferred on the Denver and Rio Grande company.

The opinion of Judge Hallett in refusing the Plaintiff's injunction is in the record.

The Denver and Rio Grande Railway was incorporated October 27, 1870, under the laws of the Territory of Colorado,

to build eight lines of railways; among others, "from Denver to a point on the Arkansas river at or above Pueblo, thence up the valley of the Arkansas to a point at or near Canon City, thence continuing up the valley of the Arkansas through the Big canon of the same to a point at or near the mouth of the South Arkansas," and "thence up the valley of the main Arkansas to the summit of the range dividing the Arkansas from the Grand River of the West, &c.

The company built their road from Denver to Pueblo, on the Arkansas, and thence up the valley to Canon City before this controversy arose in 1875. It also surveyed its line through the Grand canon of the Arkansas in January or February, 1871. Enough work was done, say $300 or $400, together with the survey, to secure the right to the canon, as the parties supposed, and thereupon the company built their road in another direction to certain coal mines and through the range of the Sangre de Cristo Mountains. The road was finished and operated as far up the Arkansas as Canon City in 1875.

On the 17th day of February, 1877, the Canon City & San Juan Railway Company was incorporated to build a railroad from Canon City to South Arkansas Postoffice, a distance of twenty miles.

This company filed a lineal map under the General Right of Way Act of March, 1875, and obtained from the Secretary of the Interior an approval of said lineal map on the 22nd day of June, 1877.

There never was presented or approved a "profile." In the big or Grand Canon of the Arkansas these two roads run over the same ground. The route surveyed by the Denver & Rio Grande company in 1871 is occupied and trespassed upon by the San Juan & Arkansas Valley Railway Company in such a way, as not only under the decree of the Court to deprive the Denver & Rio Grande company of their exclusive right to

the 100 feet on each side of their track, but to compel the latter company to build their road through the canon or gorge at a very largely increased expense, on another line than the one they chose and the cheapest. Both roads are being built within the 100 feet on each side of the track—whereas the canon is only 40 feet wide), surveyed, located, claimed and occupied by the Denver & Rio Grande company; each claims the right to the 100 feet on each side of their line, and the court held in favor of the Canon City & San Juan company.

On the 19th of April, 1878, the Denver & Rio Grande commenced work in the Grand Canon or Royal Gorge, on their surveyed line of 1871. Subsequently, and on the same day, the Atchison, Topeka & Santa Fe company began work under their San Juan charter in the same canon but different place. The D. & R. G. Co. then had their road in operation from Pueblo to Canon City. Between these points the Canon City and San Juan company had no road whatever, and no charter.

There are several propositions which we propose to establish.

1st. That the Denver & Rio Grande railway company, by the acts of Congress of June 8, 1872, March 3, 1875, and March 3, 1877, acquired a present right from the date of the act of June 8, 1872, to select and locate a line of railroad from Pueblo, up the valley of the Arkansas to a point at or near Canon City; thence through the canon in the Arkansas valley to the South Arkansas; and thence up the valley to its source, over the public lands; and that whenever they located their line on the public lands the location related back to the date of the grant, and is superior to any right, by occupation, by approval of the Secretary of the Interior, or in any manner whatever, acquired after, under right of way Act of March 3, 1875.

Congress, on the 8th of June, 1872, enacted that the right of way over the public domain 100 feet wide on each

side of the track, and such public lands adjacent thereto as may be needed for depots, shops, and other buildings for railroad purposes and yard room, not exceeding twenty acres at any one station, for every ten miles, and the right to take from the public lands adjacent thereto, stone, timber, earth, water and materials required for the construction and repairs of its railway and telegraph line, be, and the same are, hereby granted and confirmed unto the Denver & Rio Grande company, a corporation created under the incorporation laws of the Territory of Colorado, and all the rights, powers and franchises conferred by said laws on corporations, are hereby ratified and confirmed to said company, and the same rights that were conferred on the Union Pacific company by section 3 of act 2, of July, 1864, were conferred on said company.

Provided, that the company should complete its road on the Rio Grande as far south as Santa Fe, in five years, and fifty miles south each year thereafter

This right not only was not forfeited by Congress, but was extended by act of March 3d, 1877, for ten years.

And this act of June 8th, 1872, created the Denver & Rio Grande railway company, a corporation under the laws of the United States. Thus in the proviso:

"And provided, that the Denver & Rio Grande railway company is recognized as a lawful corporation, and all privileges and franchises conferred on it are hereby ratified."

On March 3d, 1875, Congress passed a general right of way to all companies, provided (section 4) that to receive the benefits thereof, any company should in twelve months after the location of any twenty miles of line, if surveyed, or twelve months after survey, file with the Register of the Public Land Office a "profile" of its road, and upon approval by the Secretary of the Interior the same shall be noted on plats in the office, and thereafter such lands shall be disposed of subject to right of way.

On the same day Congress amended the Denver & Rio Grande grant of June 8, 1872, by adding a section of the act of 1872, which was omitted, making it a lawful corporation from the date of its charter under the laws of Colorado, and *all* its powers, franchises and privileges were ratified from such date.

On March 3, 1877, after the completion of the work as far as Cañon City and south, Congress extended the time of finishing the road to Santa Fe to ten years from that date, and in default the privileges were null and void for unfinished road.

This act of 1872, to the Denver & Rio Grande company, was a grant of the right of way in *presenti*, unless the Supreme Court has erred in its interpretations of similar acts of Congress.

The Supreme Court in various cases has decided that the act of June 8th, 1872, was a grant in *presenti*, in

Leavenworth *vs.* U. S. 2 Otto, 741.

Railroad *vs.* Fremont Co., 9 Wallace, 89.

Railroad *vs.* Smith, 9 Wallace, 95.

Shulenberg *vs.* Harrmier, 21 Wallace, 44.

In the case of Leavenworth *vs.* United States, 2 Otto, 741, the meaning of the former interpretations was intensified.

"All such grants," says the Court, "are strictly construed against the grantee and do not extend beyond the intent expressed. It should neither be enlarged by ingenious reasoning, nor diminished by strained constructions. The interpretation must be reasonable and such as will give effect to the intention of Congress. If the terms are plain and unambiguous there can be no difficulty in interpreting them; but if they admit of different meanings, one of extension and the other limitation, that must be accepted in a view favorable to the grantor; in other words, what is not expressly given, or by necessary implication, is withheld—whatever is included in the exception is excluded from the grant."

It creates an immediate interest, and does not indicate a purpose to give in future. "There he is hereby granted," are words of absolute donation, and import a grant in *presenti.* The Court has held that they can have no other meaning, and the land department, in this interpretation has uniformly administered every provision.

2 Otto, 741.

Citing 9 Wal. 95, 21, Wallace, and other cases.

They vest a present title in the State of Kansas, though a survey of the lands and a location of the road are necessary to give precision to it and attach it to any particular tract. The grant then becomes certain, and by selection has the same effect upon the selected parcels as if it had specifically described them; in other words, the grant was afloat, until the line of the road should be definitely fixed.

Unless there is something materially different in the grant of land to the Denver & Rio Grande company for right of way, depot and other buildings and materials from adjacent lands, then the law is fixed, by the highest tribunal of the land, in favor of that company. The following acts of Congress show this:

Act Congress grant to Iowa to aid improvement of Des Moines river, August 8th, 1846, 9 U. S. Laws, 77.

There "be and is hereby granted to the Territory of Iowa one equal moiety, in alternate sections of the public lands, in a slip of five miles, to be selected by an agent or agents from the State, to improve the navigation of the Des Moines river." Same year, and same day, under grant to Wisconsin to improve Fox and Wisconsin rivers, (9 L. & B. p. 83.)

The Iowa lands were not more than one-quarter surveyed, when the act was passed. Act March 3d, 1849, (9 L. & B., 771): "That the right of way shall be and is hereby granted to the Atlantic & Gulf road company, over and through way of the public lands of the United States, in Florida, over

which the road, authorized by said State may pass. Company is authorized to survey and mark through public lands, the track 100 feet, to be held by them and additional twenty-five feet, and to take from public lands, earth, stone and wood, and necessary sites for watering places, depots, work-shops, along the line of said road.

Act March 3d, 1849, same day, 9 L. & B., 772.

"The right of way is hereby granted to the Mobile & Ohio railroad company for the railroad contemplated by said company to be constructed from Mobile to its northern terminus on the Ohio river, at or near the mouth of the Ohio river. May locate on any of the public lands, and take 100 feet and 125 feet, which land shall be reserved for sale, and the title shall go to the State, wherein it lies for use of said road and no other uses; said company may use stone, timber, &c."

On March 3d, 1849, (9 L & B., 352,) Congress granted to Louisiana the swamp lands in these words, "That to aid the State in reclaiming the swamp and overflowed lands, which may be or are found unfit for cultivation, be and the same are hereby granted to the State." The Secretary of the Treasury had to select said list at cost of the State, and on his approval the title was to vest in the State; and following this grant Congress,

By Act Sept. 28th, 1250, (9 L. & B., 519,)

enacted, "That to enable the State of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands thereon, the whole of these swamp and overflowed lands, which shall remain unsold at the passage of this Act, shall be, and the same are hereby granted to said State." The Act was extended to all the States.

The Secretary of the Interior was to make out a list as soon as practicable, and transmit the same to the Governor, and at his request patent the same to the State, and on that patent the *fee simple* was to vest in the State.

It was on this statute, that the case of Railroad Company *vs.* Smith, 9 Wallace was decided; where the Court held that the swamp land title was perfect, and the character of the land could be established by parol, though no patent had ever issued.

The Act of Congress Sept. 20th, 1850. (9 L. & B., 466,)

enacted that the right of way through the public lands be and the same is hereby granted to the State of Illinois for the construction of a railroad (since called Illinois Central,) from the southern terminus of the Illinois and Michigan Canal to a point at or near the junction of the Ohio and Mississippi rivers, with a branch of the same to Chicago, in the State of Michigan, and another by Galena to Dubuque in the State of Iowa, with the right to take materials from adjacent lands, provided that the right of way should not exceed 100 feet on each side of the length of the road, and a copy of the survey of the road and branches shall be forwarded to the proper local land offices, and the general land office at Washington, within ninety days after completion.

There also granted to aid in building the road odd sections of land, and the others were to be sold at twice the government price.

Act of Congress of June 10, 1852, (10 L. & B. 8) enacted "That the right of way be, and the same is, hereby granted to the State of Missouri for the construction of a railroad from the town of Hannibal to the town of St. Joseph, and from the city of St. Louis to such point in the western boundary of Missouri as the State may select, with the right to take materials from adjacent lands, right of way limited to the necessary amount for the construction and use as public highways, including stations, etc. Copy of location, when made under direction of the Legislature, shall be forwarded to the public land offices and general land office." To aid these roads a further grant was made of alternate sections.

By act of February 9, 1853, (10 L. & B., 156) it was "Enacted that the right of way through the public land be, and the same is, hereby granted to the States of Arkansas and Missouri for the construction of a railroad from a point on the Mississippi river opposite the mouth of the Ohio river, by way of Little Rock to the Texas boundary line near Fulton, with right to take stone, etc., right of way not to exceed 100 feet on each side of length of road. Copies of the survey made by the State to be furnished as in the Illinois Central act; also a grant of land to aid in construction."

Acts of Congress, May 8, 1856, enacted, "That there be and is hereby granted to the State of Iowa alternate sections of land to aid in the construction of railroads from Burlington to the Missouri river near the mouth of Platte river; from Davenport to Council Bluffs; from Lyons City north-westerly to a point of intersection of the main line of the Air Line running near forty-second parallel across the State; from Dubuque to a point near Sioux City."

"And the right of way through all reserved lands, subject to the approval of the President,"

Congress created, May 17, 1856, (11 L. & B., 15) a similar grant to Florida; right of way through reservations.

On June 8, 1856, (11 L. & B., 17) to Alabama; a similar grant to Alabama, with right of way.

On June 3, 1856, (11 L. & B., 8) a similar grant to Louisiana.

On June 3, 1856 (11 L. & B., 20) a similar grant to Wisconsin.

On June 3, 1856, (11 L. & B., 21), a similar grant to Michigan.

On August 11, 1856, (11 L. & B., 30), a similar grant to Mississippi.

On March 3, 1857, (11 L. & B., 195), a similar grant with condition precedent to Minnesota, with right of way over reserved lands in every case.

On July 1, 1862, (12 Little & Brown, 489), amended July 1, 1864, (13 L. & B., 356) Congress incorporated the Union Pacific Railroad Company and enacted sec. 2, that the right of way through the public lands be, and the same is, hereby granted to said company for the construction of said railroad and telegraph lines, with the right to take materials, etc. The right of way is granted 200 feet wide on each side of said railroad, where it may pass through public lands, including station grounds.

In addition was a land grant. Act of 1864 authorized appraisals of land and the section therefor is made a part of the grant to the Denver and Rio Grande, as already cited.

On March 3, 1863, (12 L. & B., 772), Congress made a land grant to Kansas, including the Lawrence I. & G. lands referred to in the case in 2 Otto 733. The act says, "there be and is hereby granted," and a proviso that any lands heretofore reserved by act of Congress on competent authority, be and the same are hereby reserved to the United States, except so far as it may be found necessary to locate the routes of said roads and branches through said reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States.

We could increase the number of these land grant acts by the score, and these grants *in presenti*, for the right of way to ten thousand miles of railroad and additional grants of land to more than two hundred millions of acres. We made these quotations to show the legislative history of such grants and the judicial construction of the words, "There be and is hereby granted to the Denver and Rio Grande Railway company" by the act of June 8, 1872.

2. If there is any one question in relation to these right of way and land grants from the Mobile and Ohio grant down to the Lawrence L. & G. grant, which is to be regarded as settled, it is that the language conveys a present grant. "They vest a present title, though a survey of the lands and location

of the road are necessary to give precision to it, and attach it to a particular tract. The grant then becomes certain and by relation has the same effect upon the selected parcels as if it had specifically described them."

And though Congress has never undertaken to repeal this grant which was a beneficial interest, on the lands covered by the right of way and station grounds, if such an attempt had been made it would have been irrepealable.

See Rice vs. Railroad company, 1 Black, 358.

The case of Schulenburg vs. Harriman (21 Wallace 44), was upon the grant of June 3d, 1856, to the State of Wisconsin. The language of that act is *verbatim* like the act of June 2d, 1872: "There be and is hereby granted," and continues the same.

The Court said (p. 60): "That the act of Congress of June 3d, 1856, passed a present interest there can be no doubt." The language imports a present grant, and admits of no other meaning. Commenting on the Minnesota Act, cited in Rice vs. Railroad company, (1st Black), the Court said:(p. 62): "The decision in that case does not conflict with these views." The words of present grant in the first section of the Minnesota, act were restrained by a provision in a subsequent section declaring that the title should not vest in the Territory until the road or portions of it were built.

In the Wisconsin case (21 Wallace) the act provided, that if the road was not built in ten years the remaining lands should revert to the United States. The road was not built. The Court held, (21 Wallace, p. 63) that it was well settled law that no one could take advantage of the non-performance of a condition subsequent, but the grantor, if he do not see fit to assert his right the title remains in the grantee.

3. If it could possibly be contended with a show of reason, that the grant to the Denver & Rio Grande company, of June 8th, 1872, and subsequent acts, conflicted with the general right of way act, of June 3d, 1875, (as we have shown in

another brief that they do not) then, under the decisions in (9 Wallace 85,) and (9 Wallace 95,) the Denver & Rio Grande is the elder grant, and has the superior title.

In Railroad *vs.* Fremont county (9 Wallace, 85), the act of May 15th, 1856, making a grant to the railroads, was held to exclude the land previously granted, but not certified under the swamp land grant of Sept. 28th, 1850.

Both these acts used the words, "shall be and is hereby granted," and the older grant held the property included in the railroad land grant of June 10, 1852, was an inferior title to the railroad grant of Sept. 28th, 1850. The Court said (p. 99), "now here" (the swamp land act of Sept. 28, 1850, "there be and is hereby granted,") "is a present grant by Congress of certain lands to the States, which requires something more than a reference to the township, range, and sections, to identify them as coming within it. In this respect it is like the railroad grants which only become certain by the location of the road."

"No act of Congress has ever attempted to take back this grant of the swamp lands, or to forfeit it, or give it to any other grantee. It was protected by positive reservation in the grant under which the Plaintiff claims." (See section 5, general right of way act.)

The Pacific Railroad act of July 1st, 1862, is interpreted in the same way, by Justice Field in Central Pacific Railroad company, v. Dyer, 1 Sawyer, 643.

"The grant of the right of way, ('that the right of way be and the same is hereby granted to said company for the construction of said railroad and telegraph line, etc.,') is a present grant operating immediately upon the passage of the act without reservation, and is subject to no condition, except those which are subsequent."

All acquisitions of land over which the right of way thus granted, made subsequent to the passage of the acts, were necessarily subject to the exercise of this right.

The provisions requiring the Plaintiff to file a map in two years, in no respect affect the right of way. It only furnishes the means by which the Secretary could withdraw the lands, within certain limits from pre-emption, private entry and sale.

No such provision was required in the Denver & Rio Grande Act.

In a printed opinion of Judge Hallett, he is represented, as saying, that his conclusions: "That the grant of June 8th, 1872 is not a grant in *presenti*, but a right to select a line in unoccupied lands, was apparently rejected by Judge Field, on grounds which are not stated. This must be a mistake. The Judge who dissents from Judge Field's conclusions, which are fully stated, with a precision as clear as a sunbeam, and which had long previously been made by the United States Supreme Court, in other cases, could not have read the latter.

4. It has been argued, that the Denver & Rio Grande company abandoned the route by the Grand Canon of the Arkansas. When, where, how, what act, what declaration. They had first five and then ten years to occupy it. After they had finished to it in 1875, Congress in that year recognized their right. After they had stopped work, on this route in 1875, Congress by acts of March 3d, 1877, instead of claiming a forfeiture, which it alone could claim, extended the time ten years for the main line, and there is no limitation as to the other lines, in the original grant, in express words.

5. It is argued that the act of 1872 is vague and indefinite, and that it might include a line anywhere within a strip of forty miles.

So might the Florida grant and the Mobile & Ohio grant. The latter line was 500 miles between the two named points, and the variation from a straight line might be 250 miles. So was the Illinois Central branch. There the branch was expected to begin at La Salle. It began at a point 200 miles south, and thereby doubled both the right of way and the land

grant; so the Wisconsin grants (see the map in 21 Wallace); so the Missouri act, anywhere from St. Louis to the western boundary of the State, a variation of 300 miles; so the Iowa acts, only named points 250 to 350 miles apart, and any variation from a straight line was allowed; so the Union Pacific and Central Pacific; so the Kansas act: from Leavenworth *via* Lawrence and Ohio, crossing to southern boundary of the State in direction of Galveston Bay, in Texas, no definite point whatever.

In reality few acts of Congress in the records making land grants and right of way are so definite as the Denver and Rio Grande.

"From at or above Pueblo, up the valley of the Arkansas through the Big Cañon of the same, to a point at or near the mouth of South Arkansas, thence up the valley of the main Arkansas, to the summit of the range dividing etc."

The Court below held, that "with a line located and in "process of construction from place to place, no other com- "pany would be allowed to interfere under an act even more "vague and indefinite than that of 1872." We argue that the Denver and Rio Grande Company, on April 19th, 1878, having built their line to Canon City in 1875, and surveyed, as heretofore stated, to the Canon in 1871, resumed their survey and location in the Canon on April 19, 1878, and have continued to survey, locate and occupy ever since on the line to South Arkansas and thence up the Arkansas to California Gulch, finished late in July. This survey was followed by occupancy and work of about twenty-five men along the line surveyed.

The Appellees filed a lineal map, with certain elevations marked in, perhaps, but never a profile. The Secretary of the Interior approved this linear, not profile, map after our survey and occupancy, on the 22d of June, 1877.

Their line has not yet been noted on the maps in the land office, and until so noted, by Section 4 of the act of July 3,

1875, they had no right of way because the sections were not surveyed and it could not be.

It was decided by Justice Field in 1 Sawyer, and the Supreme Court in 1 Black, the fourth section of the general right of way act, qualified the words of the first section, and under that, there is no right of way, until the last thing required by the act is performed.

We are then perfectly safe in asserting, that from the opinion of the Court in the former case, we have surveyed, located and occupied our line from the Canon to the California Gulch, in the precise manner pointed out by the Court, and our first and superior right is indisputable.

It claims a superior right under the act of March 3d, 1875; and it must claim it by virtue of a survey, begun on a part of the ground before ours had reached that part, and it must claim that the general right of way act repeals the special charter and right of way grant to the Denver and Rio Grande Company.

By the decision of the Supreme court (in 1 Black) and Judge Field, (in 1 Sawyer;) they can get no right of way in *presenti* by the General Act of 1875—the fourth section granting the right only from approval and recording of the location of a profile of the road.

The authorities which we have cited, as to the effect of a general law upon a special law, are conclusive that the general law neither repeals nor qualifies the special law, and the latter controls the former.

The Supreme Court in the cases (1 Black, 385, and Davis vs. Gray, 16 Wallace, 232) holds this grant and charter of the Denver & Rio Grande Railway is a contract, and therefore no subsequent grant by Congress could repeal it, if Congress were so disposed, which it is not.

Judge Hallett in this case, Judge Field in 1 Sawyer, and the Supreme Court in 16 Wallace have all held that in such a case as now presented the proper remedy is by injunction.

It is a universal rule of interpretation of statutes, that where words have received a legal interpretation in one statute and another statute is enacted with the same words, on the same general subject, the interpretation of the words in the first statute control the meaning of the same words in another like statute just as completely as if written in it: "The judicial interpretations become, as it were, a part of the law."

Sedgewick Com. Law, 254.

And this rule is so common that the Supreme Court has decided that the statutes of our States, when they become the subject of adjudication in another, are to receive the same construction that is given them in the courts of the former.

Elmendorf vs. Ferry, 10 Wheaton, 153.

Ever since these land grant statutes have been enacted, the Supreme Court, and the departments have invariably construed the words: "There be and is hereby granted," to mean a present grant, which becomes fixed, when the particular line of roads included in the grant is located, and the title of the located line relates back in such case to the date of the act.

The decisions of the Supreme Court have been constant and uniform, and there is no possible reason to be assigned, why the interpretation should be changed in this case.

4 Wallace, 496.

7. The Cañon City & San Juan company have never presented to the Secretary of the Interior, or the proper land offices, a "profile" of their road.

Technical words in an Act of Congress are construed in a technical sense. A "profile" means a plan or map of a railroad showing its elevations and depressions above or below a given starting point.

In all the surveys of railroads which have ever been made by the United States, the map or plan of the road has a "profile" on it. I am credibly told by an eminent engineer that he has never seen or known of one that did not have it.

The General Right of Way Act has a good reason for such a "profile." All railroads as well as common roads were not to be deprived of the use of cañons by reason of the location of railways under the general Right of Way Act And the Secretary of the Interior, before he approved of such a profile had a right to see it (and examine and determine whether he would approve it), from the "profile"—the proper mode of building road, so as not to make the cañons useless or railroad crossings useless,—and the Secretary of the Interior should see a "profile" before approving it for this reason.

8. The grant to the Denver & Rio Grande Railway company and its charter by Congress became a contract upon their location of a line of their road.

This was so held by the Supreme Court of Maryland in 4 Gill and Johnson 1, where it was held that a grant to a canal company to build a canal along the line of the Potomac river was a contract, the right to which could not be impaired by a subsequent grant.

The grant of a right of way for one hundred feet on each side of the track of the Denver and Rio Grande Railway, and the right to station grounds, as much as twenty acres for every ten miles are necessarily exclusive.

In the case at bar, the right of 100 feet takes the whole canon; the ground taken becomes property. It cannot be invaded, it cannot be occupied by an adverse railroad without condemnation. No court without an act of Congress can compel a company owning such a grant to divide it with another. Not a case can be found in any law book that a right of way or station grounds given by congress, by individuals or taken under condemnation can be taken away by order of a court of equity, and given to another company.

The Secretary of the Interior cannot do it. He cannot confer any right against the Denver and Rio Grande company if a proper profile had not been presented to him and approved by him. He is just as powerless to do it, by writing approval on a "profile," as he is to take away land already granted by a patent.

See the opinion of the Court below in both records. Folio 167 in the first, and folio 122 in the second.

It is somewhat strange that the court below should have relied on three State court decisions, interpreting State or federal laws, to override the various decissions of this court.

The case of Merritt *vs.* Northern Railroad Company, (12 Barbour 606) was upon the question, whether a staking out of a road under a deed of right of way by an individual not recorded, was not notice to a mortgagee, and very properly it was held,not, because the deed designated no right of way; that the staking out and locating was construed to mean nothing more than an entry on the lands to make examinations for the purpose of selecting a route, and this right was given under the statute and the point was, says the court, whether a mortgage given to secure a debt is to be preferred to an unrecorded grant.

The case of the Morris & Essex Railroad Company *vs.* Blair, 1 Stockton 635, was a case where the legislature chartered two companies to build two lines of railroad with undetermined lines between two termini. No conflict of routes on the face of the charters.

The other case was Northern Railroad *vs.* Gould, 21 California 260, intrepreting the general right of way act of August, 1852, 10 L. & B. 28, in which Mr. Justice Field, then of the California Supreme Court, held with another, that the General Right of Way Act, section 3, qualified the words, "the right of way, be and is hereby granted," by the words, "provided further, that whenever a location for other railroads or depots shall be selected, the officers shall transmit a correct

"plat" of the survey of the road, *before such selection shall be operative.*"

This is very poor authority to justify a circuit judge in overriding not only the opinion of Mr. Justice Field, in the 1 Sawyer, but this Supreme Court in half a dozen cases made after the 21 California 260 (1862), and which cases in the Supreme Court Judge Field followed in the first of Sawyer.

Now the general right of way Act of the 3d of March, 1875, has a qualifying provision as to the granting words in these words (section 4): "That any railroad company desiring to secure the benefits of this act, shall file with the land office a 'profile' of its road;" (not a correct plat of its survey, though that is necessary under the unrepealed act of August, 1852,) "and upon approval by the Secretary of the Interior, the same shall be noted upon the plats of the office, and *thereafter*," meaning after such noting, "all lands over which such right of way passes, shall be subject to such right of way."

Now you will look in vain through this record for any such thing: The "plat," on which is written the approval of the Secretary of the Interior has no "profile."

Now Your Honors will note the difference between the special grant of the 8th of June, 1872, to the Denver & Rio Grande company, and the general right of way Acts, 1852, and of 1875, and those right of way acts to companies which require conditions precedent, and thereby qualify the words there be and is hereby granted.

The act of the 8th of June, 1872, provides, that the right of way is hereby granted and confirmed, over the public domain 100 feet on each side of the track, together with such public lands adjacent thereto as may be needed for depots, shops, and other buildings for railroad purposes, etc., not exceeding twenty acres at one station, and not more than one station for every ten miles: provided said company shall complete its railroad, etc., within five years, extended by act of the 3d of March, 1877, to ten years, thereafter. No require-

ment is made for any previous act. No survey of route that is designated by the charter approved by act of Congress, from Pueblo, up the valley of the Arkansas river, to a point at or near Canon City; thence up the valley through the Big Canon to South Arkansas; and thence both north and west, still in the Arkansas Valley. No conditions precedent is annexed; no qualifying words are used; nothing but the performance of a condition subsequent.

The general right of way acts of 1852 and 1875 both qualify the granting parts of the acts, by conditions precedent, neither of which have been performed. And this Court certainly will hold, that "a specific grant of right of way, from Pueblo up the valley of the Arkansas through the Big Canon and a survey through that canon, prior to any other location or grant through it, will hold the canon under the oldest grant, without regard to the first survey.

The pretence of abandonment by the Denver & Rio Grande company has no foundation in law, because Congress, who could alone claim a forfeiture, before the lapse of time, given under act of the 8th of June, 1872, extended the time by act of the 3d of March, 1877, for ten years, and this was after the road from Pueblo was constructed up the Arkansas valley to Canon City. The pretence has no foundation in fact, for the survey was made in 1871 to prevent the right to the canon passing to any other company.

JAMES GRANT,

of Counsil for the Denver and Rio Grande Railroay Company.

EXTRACT

FROM

CERTIFICATE OF INCORPORATION,

And Statutes Reffered to in Preceding Argument.

EXTRACT FROM CERTIFICATE

OF THE

DENVER AND RIO GRANDE RAILWAY CO.

WHEREAS, We, the undersigned, desire to form a company and to become a body corporate under and by virtue of the provisions of chapter eighteen (18) of the revised statutes of the Territory of Colorado, for the objects and purposes hereinafter set forth; now, therefore, this is to certify as follows, viz:

1. That the corporate name of said company shall be the Denver & Rio Grande Railway Company.

2. That the object of said company is to locate, construct, operate, and maintain certain railways and telegraph lines hereinafter named and described, and to acquire, improve, and dispose of lands or any interests therein, either absolutely or conditionally, for the purpose of aiding in the construction and business of said railways and telegraph lines, and in any manner promoting the interests of the same. The said railways and telegraph lines are named, described, and by routes are designated as follows:

The Denver & Rio Grande Railway.

The route of this railway is described as follows: Commencing at Denver, Colorado Territory, thence running up the Valley of the South Platte River, on the southeast side thereof, to a point at or near the mouth of Plum Creek; thence up the

Valley of Plum Creek to a point at or near the forks of East Plum Creek and West Plum Creek; thence up the main East Branch of Plum Creek Valley, to the lake in township eleven (11), range sixty-seven (67) west, on the crest of the ridge dividing the waters of Plum Creek and Monument Creek thence down the Valley of the Monument Creek to a point at or near the junction of the Valleys of the Monument and Fontaine qui Bouille, or to a point in the Fountain Valley below the mouth of the Monument, if the detailed surveys shall determine the latter to be most eligible; thence by the Valley of the Fountain, or across its west tributaries, to such a point on the Arkansas River at or above Pueblo, as may be found upon a detailed survey to be the most eligible for intersecting the same; *thence up the Valley of the Arkansas to a point at or near Canon City; thence continuing up the Valley of the Arkansas through the Big Canon of the same to a point at or near the mouth of the South Arkansas River; thence by the Valley or adjoining slopes of the South Arkansas River and of the Puncho Creek to the summit of the divide between the waters of the Arkansas and the San Luis Park, known as Puncho Pass*; thence by the most eligible route in a general southerly direction down the San Luis Valley to the Valley of the Rio Grande del Norte; thence in a general southerly direction, by the particular route which may be determined upon a detailed survey to be the most eligible, down the Valley of the Rio Grande to the southern boundary of Colorado; thence continuing down the Valley of the Rio Grande, on either side of the river as may be found expedient, or crossing from one side to the other when desirable, to El Paso, in the State of Chihuahua, with the privilege of consolidating or uniting with and operating, any connecting railway in the Republic of New Mexico.

* * * * * * * *

AN ACT

GRANTING THE RIGHT OF WAY THROUGH THE PUBLIC LANDS TO THE DENVER AND RIO GRANDE RAILWAY COMPANY.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the right of way over the public domain, one hundred feet in width on each side of the track, together with such public lands adjacent thereto as may be needed for depots, shops and other buildings for railroad purposes, and for yard room, and side tracks, not exceeding twenty acres at any one station, and not more than one station in every ten miles; and the right to take

from the public lands adjacent thereto, stone, timber, earth, water, and other material required for the construction and repair of its railway and telegraph line, be, and the same are hereby granted and confirmed unto the Denver & Rio Grande Railway Company, a corporation created under the incorporation laws of the Territory of Colorado, its successors and assigns, and all the rights, powers and franchises conferred by the said laws on corporations created under them for constructing and operating railroad and telegraph lines are hereby ratified and confirmed to the above named railway company, its successors and assigns, and the same rights, powers, and franchises conferred by the general incorporation laws of the Territory of Colorado for the construction of railroads and telegraph lines are hereby granted to the said company, its successors and assigns, for the extension and operation of its railway and telegraph lines in and through any contiguous territory of the United States, to the northern boundary line of Mexico, subject to the compliance with the conditions and requirements of the general incorporation laws of such territory, so far as the same are applicable and not inconsistent with the laws of the United States; and the same rights, powers and privileges conferred upon the Union Pacific Railroad Company, by section three of an act approved July second, eighteen hundred and sixty-four, are hereby conferred upon the above-named company, its successors and assigns. *Provided*, that application for the assessments of damages shall be made to the court or any judge of a court having jurisdiction in the county in which the lands or premises lie. *Provided*, that said company shall complete its railway to a point on the Rio Grande as far south as Santa Fe, within five years of the passing of this act, and shall complete fifty miles additional south of said point in each year thereafter; and in default thereof the rights and privileges herein granted shall be rendered null and void, as far as respects the unfinished portion of said road. *And provided further*, that the said Denver & Rio Grande Railway Company is hereby recognized as a lawful corporation from the date of its incorporation under the laws of Colorado, and all the powers, privileges. and franchises by said laws conferred upon said company are hereby expressly ratified, confirmed, and legalized as existing from the said date of incorporation; but beyond such recognition, ratification, and confirmation of and to said company, this act shall not be construed as affirming or denying the rights of territories to pass laws for the incorporation of railway companies.

Approved June 8, 1872.

AN ACT

GRANTING TO RAILROADS THE RIGHT OF WAY THROUGH THE PUBLIC LANDS OF THE UNITED STATES.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also grounds adjacent to such right of way for station buildings, depots, machine shops, side tracks, turn-outs, and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.

SEC. 2. That any railroad company whose right of way, or whose track or road bed upon such right of way, passes through any cañon, pass, or defile, shall not prevent any other railroad company from the use and occupancy of said cañon, pass, or defile, for the purposes of its road, in common with the road first located, or the crossing of other railroads at grade. And the location of such right of way through any cañon, pass, or defile shall not cause the disuse of any wagon or other public highway now located therein, nor prevent the location through the same of any such wagon road or highway where such road or highway may be necessary for the public accommodation; and where any change in the location of such wagon road is necessary to permit the passage of such railroad through any cañon, pass, or defile, said railroad company shall, before entering upon the ground occupied by such wagon road, cause the same to be reconstructed at its own expense in the most favorable location, and in as perfect a manner as the original road: *Provided*, That such expenses shall be equitably divided between any number of railroad companies occupying and using the same cañon, pass, or defile.

SEC. 3. That the Legislature of the proper Territory may provide for the manner in which private lands and possessory claims on the public lands of the United States may be condemned; and where such provision shall not have been made, such condemnation may be made in accordance with section

three of the act entitled "An act [to amend an act entitled an act] to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the Government the use of the same for postal, military, and other purposes, approved July first, eighteen hundred and sixty-two," approved July second, eighteen hundred and sixty-four.

SEC. 4. That any railroad company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the Register of the Land Office for the district where such land is located, a profile of its road; and upon approval thereof by the Secretary of the Interior, the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: *Provided*, That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road.

SEC. 5. That this act shall not apply to any lands within the limits of any military, park, or Indian reservation, or other lands specially reserved from sale, unless such right of way shall be provided for by treaty stipulation or by act of Congress heretofore passed.

SEC. 6. That Congress hereby reserves the right at any time to alter, amend, or repeal this act, or any part thereof.

Approved March 3, 1875.

AN ACT

TO AMEND AN ACT ENTITLED "AN ACT TO AID IN THE CONSTRUCTION OF A RAILROAD AND TELEGRAPH LINE FROM THE MISSOURI RIVER TO THE PACIFIC OCEAN AND TO SECURE TO THE GOVERNMENT THE USE OF THE SAME FOR POSTAL, MILITARY, AND OTHER PURPOSES," APPROVED JULY FIRST, EIGHTEEN HUNDRED AND SIXTY-TWO.

SEC. 3. And be it further enacted, that the Union Pacific Railroad Company, and all other companies provided for in this act and the act to which this is an amendment, be, and hereby are, empowered to enter upon, purchase, take, and hold any lands or premises that may be necessary and proper for the construction and working of said road, not exceeding in width one hundred feet on each side of its center line, unless a greater width be required for the purpose of excavation or

embankment; and also any lands or premises that may be necessary and proper for turn-outs, standing places for cars, depots, station house[s], or any other structures, required in the construction and operating of said road. And each of said companies shall have the right to cut and remove trees, or other materials that might by falling encumber its road bed, though standing or being more than one hundred feet therefrom. And in case the owner or claimant of such lands and premises and such company cannot agree as to the damages, the amount shall be determined by the appraisal of three disinterested commissioners who may be appointed upon application by any party to any judge of a court of record in any of the Territories in which the lands or premises to be taken lie; and said commissioners in their assessment of damages shall appraise such premises at what would have been the value thereof if the road had not been built; and upon return into court of such appraisement, and upon the payment to the clerk thereof of the amount so awarded by the commissioners for the use and benefit of the owner thereof, said premises shall be deemed to be taken by said company, which shall thereby acquire full title to the same for the purposes aforesaid. And either party feeling aggrieved by said assessment may, within thirty days, file an appeal therefrom, and demand a jury of twelve men to estimate the damages sustained; but such an appeal shall not interfere with the rights of said company to enter upon the premises taken, or to do any act necessary in the construction of its road. And said party appealing shall give bonds with sufficient surety or sureties, for the payment of any costs that may arise upon such appeal. And in case the party appealing does not obtain a more favorable verdict such party shall pay whole cost incurred by the appellee, as well as its own. And the payment into court for the use of the owner or claimant, of a sum equal to that finally awarded shall be held to vest in said company the title of said land, and the right to use and occupy the same for the construction, maintaining, and operating, of the road of said company. And in case any of the lands to be taken as aforesaid shall be held by any person residing without the Territory, or subject to any legal disability, the court may appoint a proper person, who shall give bond with sufficient surety or sureties, for the faithful execution of his trust, and who may represent in court the person disqualified or absent as aforesaid, when the same proceeding shall be had in reference to the appraisement of the premises to be taken and with the same effect as have been already described. And the title of the company to the land taken by virtue of this act shall not be affected nor impaired

by reason of any failure by any guardian to discharge faithfully his trust. And in case it shall be necessary for either of the said companies to enter upon lands which are unoccupied, and of which there is no apparent owner or claimant, it may proceed to take and use the same for the purpose of its said railroad, and may institute proceedings in manner described for the purpose of ascertaining the value of, and acquiring a title to, the same; and the court may determine the kind of notice to be served on such owner or owners, and may in its discretion appoint an agent or guardian to represent such owner or owners in case of his or their incapacity or non-appearance. But in case no claimant shall appear within six years from the time of the opening of said road across any land, all claim to damages against said company shall be barred. It shall be competent for the legal guardian of any infant or any other person under guardianship, to agree with the proper company as to damages sustained by reason of the taking of any land of any such person under disability, as aforesaid, for the use aforesaid; and upon such agreement being made, and approved by the court having supervision of the official acts of said guardian, the said guardian shall have full power to make and execute a conveyance thereof to the said company which shall vest the title thereto in the said company.

Approved July 2, 1864.

AN ACT

To amend An Act entitled "An Act Granting the Right of Way through the Pubic Lands to the Denver and Rio Grande Railway Company, approved June 8, 1872."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That an act entitled "An Act granting the right of way through the Public Lands to the Denver and Rio Grande Railway Company," approved June eighth, eighteen hundred and seventy-two, be and the same is hereby amended by making the second proviso in said act read as follows:

Provided, That said company shall complete its railway as far south as Santa Fe within ten years of the passage of this act, and shall complete fifty miles additional south of said point in each year thereafter; and in default thereof the rights and privileges herein granted shall be rendered null and void so far as respects the unfinished portion of said road.

Approved March 3, 1877.

AN ACT

TO CORRECT A CLERICAL ERROR IN THE ACT GRANTING THE RIGHT OF WAY THROUGH THE PUBLIC LANDS TO THE DENVER AND RIO GRANDE RAILWAY COMPANY, APPROVED JUNE EIGHT, EIGHTEEN HUNDRED AND SEVENTY-TWO.

Whereas, in the third session of the Forty-second Congress the committee of conference on the disagreeing votes of the two houses on the amendments to the bill (S. 984) granting the right of way through the public lands to the Denver and Rio Grande Railway Company, submitted as part of their report the recommendation that the second proviso in the amendment of the House of Representatives adding provisoes to the end of the bill be stricken out and the following words be inserted:

"*And provided further*, That the said Denver and Rio Grande Railway Company is hereby recognized as a lawful corporation from the date of its incorporation under the laws of Colorado, and all the powers, privileges, and franchises by said laws conferred upon said company are hereby expressly ratified, confirmed and legalized as existing from the said date of incorporation; but beyond such recognition, ratification, and confirmation of and to said company, this act shall not be construed as affirming or denying the rights of Territories to pass laws for the incorporation of railway companies," which report of said committee of conference was concurred in by both houses; and

Whereas in transcribing the bill, the said second proviso in the amendment of the House of Representatives was not stricken out and the above quoted words were not inserted and do not appear in the law upon the statute books; therefore

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the said words above quoted shall be considered and taken as they were intended to be, and they are hereby made a part of said act as approved June eighth, eighteen hundred and seventy-two.

Approved March 3, 1875.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, A. D. 1878.

THE DENVER AND RIO GRANDE RAILWAY COMPANY, *Appellant,* *vs.* EBENEZER T. ALLING, *et als*, *Appellees.*	*Appeal from the Circuit Court for the District of Colorado.*

BRIEF AND ARGUMENT OF APPELLEES.

The original bill of complaint was the Cañon City & San Juan Railroad Company, plaintiff, *vs.* The Denver & Rio Grande Railway Company. Defendant below, claiming that plaintiff was not properly organized and a corporation, filed its bill of complaint against appellees as individuals, which was regarded and treated by the court below as a cross-bill, both being heard together, and upon the same testimony. The subject of the controversy being the right of way for a railroad, commencing at Cañon City, and extending westerly, up the Arkansas river, the distance of twenty miles, through what is known as the Grand Cañon of the Arkansas river. Appellant claims to have been incorporated under

the general incorporation law of the Territory of Colorado, in October, A. D. 1870, and also claims a recognition and declaration of the legality and validity of such incorporation, and a grant of the right of way in controversy, by virtue of an Act of Congress, entitled, "An Act granting the right of way through the public lands to the Denver & Rio Grande Railway Company," approved June 8, 1872, (17 Stat., 339,) and an amendment to said Act, extending the time for the completion of its railway to a given point, approved March 3, 1877. (19 Stat., 405). Appellees also claim the route by reason of a preliminary survey of some nine and one-fourth miles, made in January, 1871, and a further survey of like character, of about four miles, in February, 1872; also by reason of having employed three men twenty-two days each, in grading a road-bed at a point eight or nine miles above Cañon City, in January and February, 1871. These are all the acts of occupation or possession claimed to have been exercised by appellant prior to the 19th day of April, 1878.

The appellee, the Cañon City & San Juan Railroad Company, became incorporated February 15, 1877, for the purpose of constructing, maintaining and operating a railroad from Cañon City, in the county of Fremont, to the South Arkansas post-office, in the county of Lake; commencing at Cañon City, thence up the valley of the Arkansas river, through the Grand Cañon thereof; thence by the most practicable route, following the Arkansas river to the point known as the South Arkansas post-office. The appellee claims the right of way under the Act of Congress, entitled, "An Act granting to railroads the right of way through the public lands of the United States," approved March 3, 1875, (18 Stat., 482,) by compliance with its provisions.

In February, 1877, the same month the company was organized, it located its line from Cañon City through the Grand Cañon of the Arkansas, (the ground in controversy), up the Arkansas river, the distance of twenty miles, (testi-

mony of Mr. Brandegee, folio 418). The route from the mouth of the Grand Cañon, (two and one-half miles above Cañon City,) was through the public lands of the United States, the exterior lines of the township or townships in which the Grand Cañon was situated had been run, but the townships had not been subdivided. Shortly after the location of the twenty miles of road as stated, and within twelve months of such location, the company, by its engineers, made and filed with the Register of the U. S. Land Office at Pueblo, in the land district where the road was located, a map and profile of the same, and the same was duly approved by the Hon. Secretary of the Interior, and noted upon the plats at the Land Office at Pueblo. And although the officers of the Denver & Rio Grande Company knew of the organization of the Cañon City & San Juan Company, and the object of such company, and of the location of the line as before stated, it took no action in the premises, asserted no rights until the 19th day of April, 1878, a year and more after the location of the line by appellee, and learning, about that date or a day or two previous, that appellee was about to commence the construction of the road, appellant withdrew its men from other portions of its road and on the 19th of April, after the work of construction by appellee had commenced, and when it was in possession of the lower part of the Grand Cañon, and grading upon its located line, threw its men into the cañon, took possession of the same, and held and occupied it. At that time, as will be seen by the testimony, appellant had no located line and the stakes and marks of the preliminary survey made over seven years before had disappeared, and at the same time it put its men into, and took possession of the cañon, it put a corps of engineers at work to locate a line from the Depot at Cañon City, (two and one-half miles below mouth of the cañon) up the river and into the cañon, and it was holding with its forces, the cañon for a distance of eight miles, before the line was located into it. At this time the litigation commenced to determine the rights of the respective parties.

Having thus briefly stated the origin of the controversy, and the claims of the parties respectively to the right of way, we pass to the briefs and arguments of counsel.

II.

Judge Grant, of counsel for appellant, says that he annexes to his argument so much of the charter of appellant *as relates to the matter in controversy*. We think it has not been done. If it is necessary to construe the charter at all, it being but one document, it is necessary to construe the whole of it, and it all should be before the court; and if any part of it was before Congress, as appellant claims, at the time of the special Act of Congress granting it the right of way, was passed, it must all have been before that body, or appellant was guilty of fraud in not submitting the whole.

We shall not at this point critically examine the abstract of pleadings made by Judge Grant. An examination of them will be necessary by the court, to a proper understanding of the case. An abstract, however carefully made, unless of nearly the same length as the pleadings, must of necessity be imperfect. The one presented by counsel bears evidence of having been hastily and carelessly made; also shows a want of knowledge in regard to the subject matter of the controversy, which is not strange, as the counsel was not, to any extent, connected with the litigation.

Next in order in the same argument, is what the learned counsel has seen fit to denominate "evidence," which is a brief abstract, but so erroneous that it will be necessary to call the attention of the court to the testimony. On page 11 of the argument occurs the following:

"The plaintiffs, the Denver & Rio Grande Company, "proved by Megrue, Alling, and others, defendants, (folio "of evidence, 17), that the work for the Cañon City & San "Juan Company was begun by the Atchison, Topeka &

"Santa Fé Company on the 19th of April, 1878, by Mr. "Robinson, chief engineer of the Atchison, Topeka & Santa "Fé Company. (Folio 31.)"

In folio 17, of evidence of Mr. Megrue, we fail to find any thing of the kind. In that folio occurs the following:

"*Ques.* Under whose charge were the men put to work "on the 19th of April, working on that day?

"*Ans.* As I understand, it was under Mr. Clelland."

And same witness (folio 22) says that Mr. Clelland was the treasurer of the Cañon City & San Juan Company. Folio 31 only refers to an advertisement for men, and is not the testimony of Mr. Megrue. Folios 27 and 28, of same witness, show that he swore that there was a meeting of the directors of the Cañon City & San Juan Company on the 10th of April, 1878, called for the purpose of putting men at work in the construction of the road; that the men put at work were under the charge of the chief engineer of the Cañon City & San Juan Company. (Folio 32.) That Mr. Robinson was elected chief engineer of the Cañon City & San Juan Company on the 19th day of April, 1878. The same is shown by testimony of Mr. Alling. (Folio 50.) At folios 45 and 46 he swears the men were put to work by the company, at the order of the treasurer, Mr. Clelland. Witness (folio 50,) also swears that the men were hired by, and were under the control of Mr. Robinson, chief engineer of the company.

"*Ques.* What company was expected to begin very soon "the construction of that road, your company or the Atch- "ison, Topeka & Santa Fé Company?" (Folio 53).

"*Ans.* Our company, through its officers, as it has done."

So far from establishing the fact as stated, that the work of constructing the road was commenced by the Atchison, Topeka & Santa Fé Company, the testimony of the president of the Cañon City & San Juan Company, Mr. Reynolds, (folios 65, 68 to 76, 79, 83 to 86), Mr. Rockafellow, secretary;

(folios 87 and 88, 98 to 103), Mr. Clelland, treasurer, (folios 105 and 106, 114 to 118, and 121), testimony of Mr. Holbrook, (folios 132 and 133), all called and sworn on the part of appellant, and the testimony of Mr. Robinson, chief engineer of appellee, (folio 490), all conclusively show that a meeting of directors of the Cañon City & San Juan Company was held on April 10th, at which it was agreed that the work of constructing the road should shortly commence. That it did commence by the appellee on the 19th of April, and had at all times up to the time the testimony was taken, been prosecuted by that company, and that the Atchison, Topeka & Santa Fé Company had had nothing whatever to do with it. That the money came from the stockholders, and that there was no arrangement made with the Atchison, Topeka & Santa Fé Company even to assist by furnishing the appellee with money.

It is true the counsel of appellant attempted to prove that the work of construction was begun and being prosecuted by the Atchison, Topeka & Santa Fé Company, and for that purpose called and examined all the officers of the appellee, or nearly all, and having failed to prove a condition of affairs that did not exist, the counsel now assumes it as proved, and proceeds upon that hypothesis. Counsel also proceeds to say:

"Holbrook (record of evidence, folio 130,) surveyed and "platted the line for the Cañon City & San Juan Company, "(the date he does not state, but it must have been after "their charter in 1877,) and he surveyed and marked the "line through the cañon."

It is true Mr. Holbrook does not give the exact date, but the following appears: (Folio 293).

"*Ques.* State what position you occupied in *the spring* "of 1877?"

"*Ans.* I was chief engineer of the San Juan Railroad."

"*Ques.* State whether or not, you had a contract with "them for making surveys through the Grand Cañon?"

"*Ans.* Yes, sir."

"*Ques.* What did you do in pursuance of that contract?"

"*Ans.* I went on and made a survey *for twenty miles,* "*and made a map of the road.*"

"*Ques.* In what direction?"

"*Ans.* Up the river, west from Cañon City, with Mr. "Brandegee and Mr. Stimpson and several other men."

"*Ques.* State the character of the survey, how closely it "was made, what you did?"

"*Ans.* I run a transit line through the cañon and kept "the courses—fitted in the curves—measured the distances "with a chain, and put in stakes from every fifty to one "hundred feet, generally fifty feet," etc., describing accurately the nature of the survey.

Again, (folio 301) on cross-examination, the same witness says that it was in the spring of 1877. But if the fact was left in doubt by the testimony of Mr. Holbrook, the date was clearly fixed by Mr. Brandegee, who, Mr. Holbrook swears, assisted him in the survey. (Folio 416).

"*Ques.* State whether you were ever connected with the "survey of that cañon?"

"*Ans.* I was, with Mr. Holbrook, in February, 1877, I "think."

"*Ques.* You may give the date of that, as near as you "can, the date of the survey?"

"*Ans.* It was in the latter part of February, 1877, I "think." (Folio 418).

It will also be seen by the testimony that the survey and map made are not alone of the Grand Cañon, but of twenty miles of road, a part only of it being through the Grand Cañon.

Counsel then proceeds at great length to give abstracts of the testimony of Mr. McMurtrie, chief engineer, and Mr. De Remer, assistant engineer of appellant, and from

that it will be seen that the pretended location of the line of appellant, in the years 1871 and 1872, was only a preliminary survey, and only extending up the river from Cañon City thirteen and one-quarter miles, nine and a quarter in 1871, and four miles in 1872; and the testimony of Mr. De Remer shows, that so far from having a located road through the cañon in 1871 and 1872, that it was necessary, and he did locate the road after the 19th day of April, 1878, and after the appellee had commenced to build its road. (See folio 209).

It will also be observed that in furnishing an abstract of the evidence of other witnesses who testified at great length on part of appellee, the counsel have only given very briefly the substance of the testimony, so far as he deemed it necessary and useful to the appellant.

III.

The record of the case of the Denver & Rio Grande Railway Company, appellants, vs. Ebenezer T. Alling, appellee, (folios 74 to 98), contains the entire certificate of incorporation of the Denver & Rio Grande Company, by which it will be seen, (folio 74)—

First—That the corporate name of the company was to be, and is, the Denver & Rio Grande Railway Company.

Second—That the object of such company was to locate, construct, operate and maintain certain railway and telegraph lines thereinafter named, etc. * * * * That the said railway and telegraph lines are named, described, and by routes were designated as follows:

First. "The Denver & Rio Grande Railway," (a description of which, its route, etc., is the only one appended to the argument of the counsel).

But it will be observed that the certificate provides for eight roads, all bearing different names, although the company is only designated in the charter as the Denver & Rio Grande Railway Company.

Second—The Denver & Southern Railway, commencing at the most eligible point on the said Denver & Rio Grande Railway in the valley of the Arkansas or of the Fountain, and running in a general southerly direction to the base of the Spanish range of the Rocky Mountains; and thence crossing said range by the Sangre de Christo, Cucharos, Las Animas, or such other pass as detailed survey may determine to be the best, to the valley of the Rio Grande; thence down the valley of the Rio Grande to a connection with the Denver & Rio Grande Railway and to El Paso.

Third—The South Park Railway, commencing at a point on the said Denver & Rio Grande Railway, in the valley of the South Platte River, at or near the mouth of Plum Creek; thence up the valley of the South Platte River to the mouth of its Big Cañon; thence through said Big Cañon and up the valley of the South Platte to the South Park, still following up the valley of the South Platte, to a point at or near the town of Fairplay; thence across the "Continental Divide" by the Hoosier, Hamilton or other pass to the valley of the Blue; thence by such route as may be found most eligible with a view of developing the mineral and agricultural wealth of Western Colorado, to the western border of Colorado; and thence by the most eligible route to Salt Lake City, with a branch from said railway at or near the intersection of the Salt branch with the South Platte to the salt works.

Fourth—The Western Colorado Railway, commencing at a point on said Denver & Rio Grande Railway at or near the mouth of the South Arkansas River; thence up the valley of the main Arkansas to the summit of the range dividing the waters of the Arkansas and the Grand River of the West; thence by the valley of the Grande or such other tributary of the Great Colorado River as may be found most practicable and eligible with a view of developing the mineral and agricultural wealth of Western Colorado, to a point on the western border of Colorado; and thence by the most eligible route to Salt Lake City.

Fifth—The Moréno Valley Railway, commencing at a point on said Denver & Rio Grande Railway at or near the mouth of the Costillo, or such other eastern tributary of the Rio Grande as may be found most eligible, and to extend up said Costillo, or most practicable valley, to the mines and pineries of the Maxwell estate.

Sixth—The San Juan Railway, commencing at a point on the said Denver & Rio Grande Railway, near or accessible to the valley of the Charma, or such other western tributary of the Rio Grande as may be found most eligible, and to extend thence by such most eligible valley to the divide separating the waters of the Great Colorado from the Rio Grande, and thence to such point in the San Juan valley as may be most expedient.

Seventh—The Gallesto Railway, commencing at a point on the said Denver & Rio Grande Railway in New Mexico, between San Domingo and Santo Felipe, and extending thence by the most eligible route to the gold mines and anthracite coal fields of the "Placier Mountains."

Eighth—The Santa Rita Railway, commencing at the most eligible point on the said Denver & Rio Grande Railway in Southern New Mexico, between Fort Craig and El Paso, and extending thence in a general westerly direction to the mines of Pinos Altos and Santa Rita, and to the Silver mines of the Burro Mountains.

"It is intended that the telegraph lines mentioned in this "certificate shall be appendant and appurtenant to the said "Railway, and are to be constructed by the said Denver & "Rio Grande Railway Company, at their option, on and along "any or all of the railway routes above specified, or as near "thereto as may be expedient, and the *termini* of the said "telegraph lines are to be the same as the *termini* of the sev-"eral railways above mentioned, and along which the said "telegraph lines, or any of them, may be built."

The Denver & Rio Grande Company are to build the above described eight railways, and an examination of the

charter will show that at the time of the making of the certificate of incorporation, not one of the eight lines were located, and in each and every of them, great latitude of location is provided for.

Taking the first, the Denver & Rio Grande Railway, and it will be seen that it, at almost every point named, reserves a right of choice between two routes, and in the latter part designates no route whatever, gives no definite points. It is true, that in the same general way it designates other points—it says: "Thence up the valley of the South Arkansas river to a point *at or near* Cañon City; thence continuing up the valley of the Arkansas, through the big cañon of the same to a point at or near the mouth of the South Arkansas river," and from that point there is not even a general route designated.

In the second, there is no *termini* nor route, it may start at any point in the valley of the Arkansas river, between Pueblo and the mouth of the South Arkansas river, a distance of nearly ninety miles, or it may start at some point in the valley of the Fountain, may run in a general southern direction to the base of the range of mountains, may cross such range through either one of three named passes, or any other pass the company may select, to the valley of a river near two thousand miles in length.

The third, the "South Park Railway," has a starting point reasonably definite and for a given distance a general designated route to Fairplay; from thence there is no route whatever. It can cross the "Continental Divide" by any pass it may select, and go by any route it can, to Salt Lake City.

The fourth, the Western Colorado Railway, commencing at a point *on said Denver & Rio Grande Railway*, at or near the mouth of the South Arkansas river; thence up the valley of the main Arkansas to the summit of the range; then by any route to be selected, to the western border of Colorado, and then to Salt Lake City. Which was also to be the terminus of the South Park Railway, providing, as will be seen, for two lines of railway to Salt Lake City.

We shall not take time to examine the other four railways provided for, an examination of their descriptions as given in the charter will show each of them to be equally indefinite.

IV.

The evidence shows that the appellant was chartered in the year 1870; that in February, 1871, the company made a preliminary survey from Cañon City up the valley of the Arkansas river; that the extent of such survey was nine and one-fourth miles, and embraced a part of the Grand Cañon, the ground in controversy; and that in February, 1872, a further preliminary survey of four miles was made. The evidence also shows that in May, 1871, (testimony of Thornton, folios 261 to 263; W. J. Robinson, testimony, folios 269 to 271), a small amount of work had been done, twenty or twenty-two days' work each for three men, in the upper part of the Grand Cañon; that such work was not done under charge of an engineer, but the workmen found a few stakes there with figures on, by which they were guided. That was all the labor performed.

The testimony of W. H. Greenwood, the general manager and chief engineer of the appellant at that time, shows the intention of the company in performing that labor and making the preliminary survey. (Folio 365).

"*Ques.* What was the object of that survey at that "time?"

"*Ans.* The object was to retain control of the cañon for "the Denver & Rio Grande Railway Company."

Speaking of the work. (Folio 366).

"*Ques.* Did you, as manager of that company, know for "what purpose that work was done?"

"*Ans.* I was of the impression I did." * * *

"*Ques.* State what was the purpose, intention?"

"*Ans.* *The intention was to do work enough to keep the "right of way through the canon, if they could, as we were "afraid some other parties might enter in there and trouble us "in the construction.*"

"*Ques.* At the time that work was done, was there any "intention on the part the Denver & Rio Grande Company "or Union Contract Company, to construct a road in that "vicinity immediately or soon?" (Folio 367).

"*Ans.* They could not have constructed as there was no "money raised for that purpose at the time. The policy of "the company shows their intention in the organization of "pools for building."

"*Ques.* Could a road have been constructed at that time "from that end?"

"*Ans.* Of course it could, it would have required to "construct from that end, first, to commence construction, "and then haul the iron up there and then haul your iron "back."

It will readily be seen that the small amount of labor performed was wholly for the purpose of preventing others from appropriating the cañon, and was no part of an organized plan for continued construction. That it was done at the upper, instead of lower part of the cañon. That this company had no money for construction. It will also be seen that the short line of preliminary survey was run only for the purpose of holding the cañon, without the means or intention of constructing a road at that time, but for future use, if any. The reason is obvious, the cañon was on the route designated in the charter for the Denver & Rio Grande Railway, which was the main or trunk line, and was at that time expected to be built on that route.

The testimony will show that with the exception of the small amount of labor done at the head of the cañon, and the preliminary survey of thirteen and one-fourth miles, in 1871-2, no work was done, no survey or location was made, nor any claim or right asserted to the ground in contro-

versy, by any act of the appellant, until the 19th of April, 1878, when the same was in the actual occupation of the Cañon City & San Juan Company.

V.

The Denver & Rio Grande Railway was completed from Denver to Pueblo about the 15th of June, 1872. In October of same year it was continued up the valley of the Arkansas river to La Bran, (coal mines), about eight miles below Cañon City, (testimony of Mr. Weitbrec, folio 348), which remained the western terminus until 1875, nearly three years, when it was completed to a point about one mile east of Cañon City—about eight miles more having been built—to the present western terminus. The route designated in the charter of the Denver & Rio Grande Railway is as follows:

* * * "Thence up the valley of the Arkansas "river *to a point at or near Canon City;* thence continuing "up the valley of the Arkansas through the big cañon of the "same to a point at or near the mouth of the South Arkan-"sas river; thence by the valley or the adjoining slopes of "the South Arkansas river and of Poncho creek, to the "summit of the divide between the waters of the Arkansas "and the San Luis Park, (known as Poncho Pass); *thence* "*by the most eligible route, in a general southerly direction,* "*down the San Luis valley to the valley of the Rio Grande* "*del Norte; thence in a general southerly direction by the* "*particular route which may be determined upon by a detailed* "*survey to be the most eligible, down the valley of the Rio* "*Grande to the southern boundary of Colorado,*" etc.

In the summer of 1873, two years before work was resumed in the Arkansas valley between La Bran and Cañon City, the appellant commenced the construction of its road south or southerly from Pueblo, and completed it to Cucharas, a distance of fifty miles, in February, 1876; continuing its construction of the line west from that point, it was com-

pleted through the Sangre de Christo Range to Garland, in San Luis valley, August 1, 1877, a distance of sixty miles, and in July, 1878, the road was completed to Alamosa, upon the river and in the valley of the Rio Grande del Norte; and the company was, at the date of the taking of the testimony, constructing its road south from Alamosa down the valley of the Rio Grande. (Testimony of Weitbrec, folios 326 to 330 inclusive). It will readily be seen, by comparing the facts and the testimony of Mr. Weitbrec, the treasurer of the appellant, with the designated route of the Denver & Rio Grande Railway in the charter, that the San Luis valley, the Rio Grande del Norte, and the valley of the same, was reached by a different route than the one designated up the Arkansas river; that the same points, viz: San Luis valley and the Rio Grande del Norte, have been reached, and the work of construction pushed forward *down the valley of the Rio Grande towards the southern boundary of Colorado, towards El Paso, etc.*

If any evidence were necessary to establish the fact of abandonment of the route by the way of Cañon City, the Grand Cañon, the mouth of the South Arkansas river, and Poncho Pass, for the Denver & Rio Grande Railway, aside from the fact of the actual construction of the road over another route, we think it can be found in the testimony. See the testimony of Col. W. H. Greenwood, (folios 365-6):

"*Ques.* When you speak of the Denver & Rio Grande, "what road do you mean to designate by that name?"

"*Ans.* The original intention was to build from Den-"ver to Pueblo, thence up the Arkansas river through the "Poncho Pass south to El Paso."

And as to the change and adoption of the other route, see testimony of same witness, (folios 369 to 373). And that the road south from Pueblo was designated and treated by the company as the main line, and the road to La Bran and afterwards to Cañon as a branch, see testimony of Mr. Greenwood, (folios 373 to 375), also testimony of Mr. Weitbrec, (folios 330 to 336). We would also call attention to

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the record of the case of the Denver & Rio Grande Railway Company, appellant, vs. Ebenezer T. Alling, *et als;* (folios 454 to 644); to second annual report of the board of directors of the Denver & Rio Grande Railway, to the stockholders, for the year 1873, signed by W. J. Palmer, president. In folios 548, 549, after speaking of the money panic, etc., the report says:

"It is by delaying for at least a year this building of the "Trinidad extension, and by postponing the completion of "*the branch line* in the Arkansas valley *to its proper terminus* "*at Canon City*, which would have thrown a considerable "new traffic over the whole length of the main line, more, "perhaps, than by causing prostration in the actual carry- "ing business, that the prosperity of the company has been "most retarded by the panic." (Folios 552 to 555).

"It was intended to complete the Arkansas branch to "Cañon City early in the autumn of 1873, but the financial "condition of the country compelled us to leave it in an un- "finished state. The line being considered under construc- "tion, the interest on the bonds issued under this branch "mortgage (all of which are owned and permanently held by "trustees for the Central Colorado Improvement Company) "was paid by the same construction company, who operated "the branch and received all of the earnings, and they will "continue to be so paid until November 1st next, inclusive.

"By the tonage it has thrown over the main line, and the "cheap and excellent coal it has furnished for operating the "railway, this branch has already been of considerable benefit "to the main line, but it was never expected to pay directly "until so completed, and the interest during construction "was included in the original estimates of cost of the work.

"However, the nine miles required to reach Cañon City "are now completed (July 6, 1874) and for the twelve months "following November 1st next, the branch will probably "earn its interest. It will besides, by the additional passen- "ger travel and freights of merchandise, stone, ores, hay,

"cattle, potatoes, coal, etc., which this completion will throw "over the main line—using the latter chiefly for 120 miles "to and from Denver—add to the *net earnings* of the main "line for the coming year, the estimated amount of $86,000.

"The business and prospects of this branch will be more "particularly referred to hereafter. (Folios 605 to 608)

"*Arkansas Branch*—The interest obligations of the Arkan- "sas branch to November 1st, next, inclusive, as heretofore "stated, will continue to be paid by the Union Contract Com- "pany, who will receive the earnings of the branch until "that time, and hand over any surplus to the railroad com- "pany.

"It is believed that another year's growth on this division "in its coal trade, and the carrying of building stone, ore, "cattle, hides, in the population of Pueblo, Cañon City, "La Bran, the development of the Hardscrabble silver mines, "the increased production of Wet Mountain valley, the "pleasure and health travel to the hot and cold mineral "springs of Cañon City, and the transportation of general "merchandise and machinery to the San Juan and other "mining districts, west and southwest, can scarcely fail to "result in entirely satisfactory earnings.

"*The mortgage on the branch is entirely distinct from that* "*on the main line, and is for $1,040,000, on which the total* "*interest obligations are $72,800 gold yearly.* The bonds are "all held by the trustees for the Central Colorado Improve- "ment Company.

"According to our estimate, besides the net earnings of "the branch itself, a larger sum than this interest will be "added to the present net revenues of the main line alone "during the following twelve months, in direct consequence "of the construction of this branch and chiefly by reason "of its completion."

Again, (folios 620 to 622), it is spoken of as *a branch*, and Cañon City as a terminus, and of a wagon road from that

point to Poncho Pass, that would make Cañon City a shipping point from the different mines, etc. As before stated, the branch road was completed to La Bran, eight or nine miles from Cañon City, in 1872, and that remained the terminus until 1875; during that time the citizens of Cañon City were making efforts to get the road to that place; see testimony of B. F. Rockafellow, (folios 470 to 482), and exhibits "B," "C" and "D," record of case of Denver & Rio Grande Railway Company vs. Alling *et al*, (folios 534 to 554), which are copies of letters written by W. S. Jackson, acting vice president, W. J. Palmer, president of the Denver & Rio Grande Railway Company, in which it is expressly declared that the company will not *build further west unless paid to do so.* The language of President Palmer being, (folio 358), "*I do not consider that the expenses of continuing our line in the Arkansas valley, from La Bran to Canon City, and of keeping it up, will be warranted unless your people come forward to help in the work,*" etc.; and then proceeds to state the terms upon which this company would build; and the letters of Mr. Jackson, treasurer and vice-president, are to the same effect; and the testimony of Mr. Rockafellow, before referred to, and the testimony of Mr. Weitbrec, (testimony, folios 341 to 347), show that the company would not, and did not, extend their branch road westward eight miles, to Cañon City, until they were paid by the inhabitants of Cañon City $50,000 in bonds and several tracts of land, the whole, according to the testimony of Mr. Weitbrec, being nearly sufficient to construct the road that distance.

Counsel of appellant, page 29, (4) of Judge Grant's argument, says:

"It has been argued that the Denver and Rio Grande "Company abandoned the route by the Grand Cañon of the "Arkansas. When? Where? How? What act? What dec-"laration? They had first five, then ten years to occupy it."

These are certainly pertinent inquiries, and if we have not already fully answered them, we will try to do so very briefly.

First, "When?" In the year 1872, when it concluded to build the Denver & Rio Grande road by a different route; when the terminus of the road upon the original route was made at La Bran, nine miles below Cañon City, and made the road from Pueblo up to that point *a branch* of the Denver & Rio Grande. As to the exact spot where it was abandoned, we cannot say, for we are at loss to know what counsel meant by the inquiry. If meant to apply to the route, we can only say all that part of the route designated in the charter, between Pueblo and Alamosa on the Rio Grande, (the point reached by the other route), by the way of Cañon City, Poncho Pass, etc. But if meant to ask at what particular point the officers of the company were, when they concluded to abandon the route, we cannot answer.

As to "how?" we can only say by making a reconnoissance up into Poncho Pass, by its engineers, in February, 1872, quitting the route and building over the other and shorter route.

As to the acts and declarations, we think we have fully answered them heretofore.

The counsel then proceeds:

"They (meaning we suppose the appellant) had first five "and then ten years to occupy it, after they had finished it "in 1875. Congress in that year recognized their right. "After they had stopped work on the route in 1875, Con- "gress, by Act of March 3, 1877, instead of claiming a for- "feiture, which it alone could claim, extended the time ten "years for the main line, *and there is no limitation as to the "other lines in the original grant, in express words.*"

The counsel again refers very briefly to this question of abandonment, in the last clause of his argument, (page 36), and though a little differently worded, the idea intended to be conveyed is the same, viz: that there was no abandonment, because Congress, after the company had completed the *branch road* to Cañon City and then stopped, by Act of

the date of March 3, 1877, extended the time for completing the *Denver & Rio Grande Railway* to a point as far south as Santa Fé.

VI.

We shall hereafter have occasion to examine the different Acts of Congress upon which the Denver & Rio Grande Railway Company rely, as to the legal effect and extent of the pretended grant. But we will now proceed to examine them for another purpose, viz: *admitting*, for the present, and for the purposes of this argument, that the grant was in its legal effect all that is claimed for it, *was there any grant whatever of the right of way for a branch road from Pueblo to Leadville, by the way of Canon City, the Grand Canon, and the mouth of the South Arkansas river?*

We have already shown that the Denver & Rio Grande Railway was built by another route than the one designated in the charter. That it reached at Alamosa the point, or at least a point designated in the charter, and that the work was being prosecuted south of that point on the route designated, on its course toward a point as far south as Santa Fé. That the road up the valley of the Arkansas, as far as Cañon City, *was a branch* of the Denver & Rio Grande road. That by the declaration of its managing officers, as long ago as 1873, that the then terminus at the coal banks below Cañon, was as far west as the company intended to construct, and that it only constructed to Cañon City when paid for the construction.

The road, upon the survey, location and construction of which the Denver & Rio Grande Company claim to have entered on the 19th day of April, 1878, was the continuation of the Arkansas valley branch from Cañon City by the way of the Grand Cañon, mouth of the South Arkansas river, and the valley of the upper Arkansas river, to California Gulch, or Leadville, being from Cañon City to the mouth of the South Arkansas river over the route desig-

nated in its charter as the Denver & Rio Grande Railway; and from that point, instead of deflecting to the south by the way of Poncho Pass and San Luis valley, on the route designated for the Denver & Rio Grande, it continues on up the Arkansas river, nearly north from the mouth of the South Arkansas, in almost an opposite direction to the designated route of the Denver & Rio Grande, on the route designated in the charter as that of the *Western Colorado Railway*, which is described in the charter as "commencing at a point on said Denver & Rio Grande Railway at or near the mouth of the South Arkansas river; thence up the valley of the main Arkansas to the summit of the range," etc. The right in controversy in this case is from Cañon City, through the Grand Cañon, to the twentieth mile post from Cañon City. An examination of the bill of complaint of the appellant, and their answer to the bill of the appellees, will show that neither of them contain any allegation of the intention of the company to construct, continue the construction of, or resume the construction of the *Denver & Rio Grande Railway*, nor could there be, for the reasons already shown, the intention and destination is studiously avoided; and the same appears in the evidence of its officers when examined on that point. Mr. Weitbrec, the treasurer of the company, who swears he had charge of construction, testifies as follows: (Folios of testimony, 338 to 341).

"*Ans.* The road I was instructed to engage in building "was that portion of the description which you have read "relating to the line between the present depot of the Den- "ver & Rio Grande Railway at Cañon City, as far as the "South Arkansas, *beyond that, I had no instructions.*"

"*Ques.* Had you any knowledge of the direction in- "tended to be run from that point?" etc.

"*Ans.* I don't think I clearly understand. Do you mean, "had I any knowledge the company was going to build this "line any farther?"

"*Ques.* Yes, sir; I ask you what knowledge you had, "if any, of the intention of the company as to where they "would run that road?"

"*Ans.* No positive knowledge, that that line would be "extended any farther than that point."

"*Ques.* Then it was not the intention of either the Den- "ver & Rio Grande or the Union Contract Company, to "construct that road through the Poncho Pass and down "the San Luis valley to Mexico, was it?"

"*Ans.* I don't know."

"*Ques.* Don't know whether that was the intention of "the company or not?"

"*Ans.* I don't."

"*Ques.* Do you not know whether it was the intention "of the company to run that line down the Rio Grande to "Alamosa?"

"*Ans.* I do not."

"*Ques.* You don't know whether it was their intention "to run through the Poncho Pass at all?"

"*Ans.* From the South Arkansas? I don't know."

Yet it was notorious that the company intended to build from Cañon City to California Gulch, (Leadville,) as recent developments of great mineral wealth at that point and an influx of population and large amounts of supplies to be carried in, and ore taken out, made the construction of the road desirable.

The Act of Congress of June 8, 1872, upon which the claim to right of way by appellant is based, is as follows:

"That the right of way over the public domain, one hun- "dred feet in width on each side of the track, together with "such public lands adjacent thereto, as may be needed for "depots, shops, and other buildings, for railroad purposes, "and for yard room and side-tracks, not exceeding twenty "acres at any one station, and not more than one station in

"every ten miles, and the right to take from the public "lands adjacent thereto, stone, timber, earth, water, and "other material required for the construction and repairs of "*its railway and telegraph line*, be, and the same are here- "by granted and confirmed unto the Denver & Rio Grande "Railway Company," etc., * * * * * "for the extension and operation of its *railway* and tele- "graph lines, in and through any contiguous territory of "the United States, to the northern boundary of Mexico," "etc. * * * * * * * * * "*Provided*, that said company shall complete its *railway* to "a point on the Rio Grande, as far south as Santa Fé, with- "in five years of the passage of this Act, and shall com- "plete fifty miles additional *south* of said point in each "year thereafter."

The amendment to the Act of March 3, 1877, is as follows:

"*Provided*, that said company shall complete its *railway* "as far south as Santa Fé, within ten years of the passage "of this Act, and shall complete fifty miles additional south "of said point in each year thereafter," etc.

It will be seen that the grant of the right of way is only to one road, the language used being *railway*. What railway, is clearly pointed out, the Denver & Rio Grande Railway running *south* to the boundary line of Mexico. As before shown, the charter of appellant provides for the construction of eight roads, two of which, the South Park and Western Colorado, are to terminate at Salt Lake City. No right of way whatever, is granted to any but the Denver & Rio Grande. So far as appears from the Act itself, the charter of the company was not before Congress at the time of the passage of the Act, nor any part of it, except the designated route of the Denver & Rio Grande Railway, and the same conclusion must be reached from the debate in Congress upon the passage of the Act, (the only debate that occurred,) Con. Globe, part 4, second session XLII Congress, p. 3356, by which it appears that the certificate of

incorporation was not before that body, and that the Act was understood to simply grant the right of way and confirm corporate powers to the main line from Denver, Colorado, to Chihuahua, Mexico. The Act mentions no other road, line or branch, consequently the Colorado Western Railway can take nothing by reason of said Act or grant. And even if the route had not been abandoned and the road constructed by another, the company could take no advantage of a grant made to its main line or the Denver & Rio Grande Railway, for the purpose of constructing a different line of road; this road, if completed from Cañon City to Leadville, would be a road never contemplated by the charter, leaving the main line at Pueblo, and terminating at Leadville; whereas, the charter required the main line to traverse that route as far as the mouth of the South Arkansas river, then deflect to the south, and the Colorado Western to leave the main line at South Arkansas river, and continue west up the river, over the range and on to Salt Lake City.

If the appellant had any rights to the Grand Cañon by the Act of 1872, it was only for the purpose of constructing the Denver & Rio Grande Railway *between the termini named and on the route designated*, and it could take no advantage of it for the purpose of constructing a different road.

> Worke vs. Junction R., 5 McLean, 425.
> Little Miami R. R. vs. Saylor, 2 Ohio St., 236.
> Morehead vs. Little Miami R. R., 17 Ohio, 236.
> Hazen vs. B. & M. R., 2 Gray, 574.

And as there is no allegation in the bill, or proof of any intention on the part of the Denver & Rio Grande Company to construct that part of the road as part of a continued line on the designated route of the Denver & Rio Grande Railway, the company could take nothing by reason of the preliminary survey for the Denver & Rio Grande Railway or a grant of right of way for it.

VII.

It is clear, both upon principle and authority, that the running of a preliminary survey nine and one-fourth miles up the Grand Cañon in January, 1871, and four miles further in February, 1872, was no appropriation of the cañon. Neither was the few days labor performed in the early part of 1871, when both were stopped, and even the few miles of survey was never perfected; and from the last date of the pretended occupancy, it was over six years before appellant pretended to assert a title.

Morris & Essex R. R. Co. vs. Blair, 1 Stock., 635, was in very many respects a case similar to this. At page 645 it is said:

"It may be true that the complainants first actually sur-
"veyed in the passes where the conflicts occur, although
"there seems to be some doubt on this subject, but assum-
"ing it to be true, the mere experimental surveying of a
"route will not confer any vested or legal right until it shall
"have been adopted; until then the company is in no wise
"committed to it. If done by their direction, they may
"change their mind and go elsewhere. It may be the mere
"act of their engineer, and he may recommend it or not.
"If he should, the company may reject it and select an-
"other route. Although the complainants, therefore, may
"have first surveyed the conflicting passes in the mountains,
"yet the Warren company afterwards surveyed the same
"passes, and first adopted the route, and first filed their sur-
"vey in the office of the secretary of state. This gave
"them a legal right to the route surveyed, and, in my view,
"excluded the complainants from occupying the same land."

See, also, Merritt vs. Northern R. R. Co., 12 Barbour, 606.

VIII.

In answer to the arguments of the different counsel, we propose to notice in the first instance the positions taken and authorities cited by them, in the order presented by Messrs. Wells, Smith & Macon.

First—As to the interest conferred by Act of Congress of June 8, 1872, the assertion is, that it conferred an immediate and vested interest in the land afterward selected for its way. That the language, "be and the same are hereby granted and confirmed," imports a present grant, and not a grant *in futuro*, even though the thing granted be not at the time definitely located or known.

By the express wording of the grant itself, it was a grant *in præsenti*, of no specific tract of land, nor of a right of way over any specific tract, but simply a grant of a right of way over the public domain, a license to enter and do acts which, but for the Act, would be acts of trespass. No right of way was, then, specifically granted, nor could be until the line over which it must extend had been designated with reasonable certainty, nor until a road was located. It was, then, an executory license to go upon the public domain, to locate a line, and secure to itself a right of way, together with the necessary land appurtenant for depots, side-tracks, etc. The question is not whether the grant contained in the Act of June 8, 1872, was a grant *in præsenti* or *in futuro*, but what in fact the grant was, what did the Act effect, and what did the grantee take thereby? It may be true that the grant is one *in præsenti*, and yet not be such an one as "conveyed a vested and immediate interest" in any specific land, or a vested interest in any land whatever, but simply a right to acquire a vested interest in land by doing certain prescribed things. A vested estate in land gives an equitable or legal seizure, and it must be either in possession or in interest. In the former there

must be a fixed right of present enjoyment, and in the latter a present fixed right of future enjoyment.

2 Bouvier's Law Dic., 625.
4 Kent's Com., 230.

It will not be contended that this grant, whatever it was, executed itself, or so definitely designated the land to which the "interest" attached, that the interest became vested in possession, for such a claim would vest in possession the whole public domain over which, by its charter, the road might legally be located; which is a little more than the appellant has yet claimed. Nor can it come under the claim of an estate vested in interest, since it has no present fixed right of future enjoyment, for since all right to land or the use of land and the taking material, etc., is by the Act itself made contingent upon its use of the right of way therein granted; it is self evident that its right to the land or the use of the land, did not by such Act become "a fixed right" of future enjoyment of such land.

If, as the argument of counsel supposes, "a vested interest in the land which appellee has now selected for its way," passed to the appellant by virtue of the Act alone, it was a fixed right to the future appropriation and *use* of any part of the public domain over which the road might thereafter be located, together with the land appurtenant thereto and needed for depots, etc.

That this can not be true is evident from the last clause of said Act, which provides, "that the company shall com-"plete its railway to a point on the Rio Grande, as far south "as Santa Fé, within five years of the passage of this Act, "and shall complete fifty miles additional, south of said "point, each year thereafter, or in default thereof the *rights* "*and privileges* herein granted shall be rendered *null and* "*void* so far as respects the unfinished portion of said road."

It speaks only of "*rights and privileges*," but it carefully secures to the company *all* interests in land acquired by it by completion of its road, thus clearly showing that it meant

that the vested interest in the land should be held only by virtue of the construction of its road, and that the actual grant was one of "rights and privileges," not of estate in lands. Nor are the authorities cited by appellant in conflict with this view of the case, nor do they fully support its view of a vested interest in the land, although they may as to the present nature of the grant. It will be observed in this case, that the right claimed by appellee is one derived from the government, and by virtue of a compliance with an Act of the government, to wit: that of March 3, 1875, granting to railway corporations the same "rights and privileges," in the same language as those granted to appellant by Act of June 8, 1872, upon compliance with certain requirements contained in said Act of 1875, and the government is therefore the grantor, and unless the grant of 1872 was of such a nature as to preclude it from granting the right to us, the former grant did not vest such an estate in the land as appellant now claims.

By reference to cases cited by counsel, it will be seen that in 2 Wheat., 197, 2 How., 581, 12 How., 59, 18 How., 19, and 9 How., 365, the controversy arose, and the rights claimed against grantees accrued after the requisite steps to give certainty to the grant, such as survey, allotment, etc., had been taken, and that there was no question therein, as to what the government granted. In 2 Otto, 740, the court lays down the rule "that a grant does not extend beyond the "intent it expresses, is neither to be enlarged by ingenious "reasoning, nor diminished by strained construction. The "interpretation must be reasonable, and such as will give "effect to the intention of Congress. This is to be ascer- "tained from the terms employed, the situation of the part- "ies and the nature of the grant. If these terms are plain "and unambiguous, there can be no difficulty in interpret- "ing them; but, if they admit of different meanings, one "of extension, and the other of limitation, they must be "accepted in a sense favorable to the grantor. And if rights "claimed under the government be set up against it, they

"must be so *clearly defined* that there can be *no question* of "the purpose of Congress to confer them. In other words, "what is not given expressly or by necessary implication, "is withheld."

Dubuque, etc., vs. Litchfield, 23 How., 66.
Rice vs. R. R. Co., 1 Black., 380.
Charles River Bridge vs. Warren B., 11 Pet., 420.

The cases cited in 9 Wall., 95, 21 Wall., 44, and 2 Otto, 733, were all grants of land to the state, to aid in the construction of a railroad. In the former case, the government had never manifested any dissatisfaction with the proceedings under which the party claimed title, and in the latter case the land was excluded, because not included within the meaning and terms of the grant.

In the case at bar, not only does the grant of June 8, 1872, fail to show any intention to pass or transfer an estate in land, but shows by its very terms that no estate therein was intended to be granted, except upon completion of the road, and the subsequent Act of March 3, 1875, shows that the government has never recognized any such claim as that now made by appellant. It is manifestly absurd to say that there could be "a present vested grant" to land, when there was no specific land in which it could vest, and no certainty that it would ever vest or attach to any land whatever. So, too, the use of the words "rights and privileges," and the proviso, that in default of completion of road such "rights and privileges" should be null and void as to the unfinished portion, shows that the Act was a *grant* of right of way, and a *right to acquire* land *only*, and not a grant *in præsenti* of land, or any interest in land, but simply a license to go upon land.

N. R. R. Co. vs. Gould, 21 Cal., 260.

Again, not only is the right claimed not given in terms, or by necessary implication, but to construe the laws so as to effect such an object, would be to reverse the whole pol-

icy of the government in its dealings with corporations of this character. For sixteen years, at least, it has endeavored to promote and encourage the construction of railroads over the public domain, and to that end it has donated not only land, but material, for that purpose, yet in no case has it ever done this by granting exclusive privileges to any one corporation, except upon stringent restrictions as to work to be done, to secure the bounty proposed to be given.

Nor is this a grant of a right of way as such, for since "a right of way *ex vi termini*, imports a right of passing in a particular line," (Jones vs. Percival, 5 Pick., 485,) a grant of right of way must designate some line to which the grant may apply. It must, as was said by Judge Hallett, of the circuit court, in this case, "come within something less than forty miles of the line of location." The certificate simply indicates the general course and direction of the lines, and was not such a designation or description of its way between the points named, as could either charge the public lands lying between the points named, with an easement, or prohibit the government from granting a right of way over the same tract by subsequent legislation, a subsequent grantee having designated its right of way by survey, plats, etc.

To the second proposition laid down by appellant, that as to the narrow parts of the cañon, the grant was "a present and vested one," we only need add to what we have already said upon the nature of the grant, and what was granted, the remarks of the learned judge, in opinion given in this case, that "the grant is an entirety as to all public lands lying in the course of the several lines of road, it would be absurd to say that it was intended to pass this cañon by description, and nothing more."

But counsel says the only reason which has ever been assigned, to say that the grant was not throughout its whole length a vested present grant, is, that in certain parts it was yet to be located. To which we say, not so. The reason we assign for saying it was not, throughout any part of its length, a vested present grant of interest or estate in land, is, that the words of the Act itself show that it was not intended as a grant of any interest or estate in land of any kind, but simply a grant of rights and privileges, by which an interest in land might be acquired, a grant *in præsenti* of these privileges, and nothing else. The intention of Congress was to give just what it clearly expressed, a right of way over the public domain, provided they located such right of way so as to give to it certainty and precision before any other corporation had secured such right.

Appellant's third proposition is that its rights under the Act of June 8, 1872, are everywhere superior to the rights of appellee under the Act of March 3, 1875.

Admit, now, that Congress could not resume or derogate from its grant, and that prior appropriations are excepted by implication, from a subsequent public grant, it by no means follows that the rights of appellant are superior to those of appellee; a license like the one under discussion is revocable at any time, so long as it remains executory. A mere grant to go upon land is not property in any sense of the word.

The cases cited by counsel, from 4 Pet., 511, 18 Cal., 25, 19 Penn. St., 214, were all cases relating to inchoate titles

to land, which is not true of this case. The case in 4 G. & J., 1, involved a question of the right of way for a canal commencing at tide water on the Potomac at Baltimore, and extending along the river to Cumberland, or to the mouth of Savage creek, containing also other specifications showing the route to be along the river in connection with it, and as reported upon by United States engineers, on the eastern side thereof.

True, the court in that case, held that the right there given to select its route, designated and conformed as it was, to the river level and along the river, was one which could not be taken away by legislative action, but it was so held on the ground that the charter by which the right was given was a contract with the state, and hence, within the constitutional prohibition to any state legislation impairing the obligation of a contract, and also upon the ground that the nature of the designation of the route along the river, and improving the navigation of the river, sufficiently designated the land, and that the evident intention of the legislature was that the right and interest in the land should vest in the company. Now, without adverting to the fact that constitutional prohibition to the states does not apply to Congress, we say, to place rights granted to a corporation beyond the control of Congress, and to debar Congress from endowing other corporations with the same rights and privileges, these rights must be such as are essential to its existence, or else they must be expressly secured to it by its charter, so as to become a part of its contract with the government.

2 Redf. on Railway, 408.
Charles R. B. vs. Warren B., 11 Pet., 420.
State vs. Noyes, 47 Me., 189.
Lafayette R. Co. vs. N. A. & S. R. Co., 13 Ind., 210.
Turnpike Co. vs. State, 3 Wall., 310.

And the fact that the latter franchise destroys the first, is no objection to the latter grant, the legislature being the judge as to when the public good requires such grant.

Bridge Co. vs Hoboken L. Co,, 1 Wall. 116.
Richmond vs. Louisa R. Co., 13 How., 71.
President, etc., vs. Trenton Co. R. Co., 2 Beas., 46.

Again in said case, 4 G. & J., the court found that the language of the charter left no doubt as to the intention of the legislature to grant a right of way, that was sufficiently certain, by the language used in designating it, which is exactly what the circuit court has said in this case has not been done, and which we claim is clearly correct, for, by reference to the evidence taken, it will be seen that even in the *gorge*, there is room for two roads throughout its whole course, while in the case under review, a route for a canal after the railroad had been located, was, as the engineer said, a "*canal impracticability*."

The fourth proposition is, that "the survey of appellant "through the cañon in 1871, gives it the better right."

By reference to the testimony referred to in folio 147, *et seq.*, it will be seen that all the survey ever made previous to April 19, 1878, was a preliminary one, and was staked every one hundred feet, and was made in January and February, 1871.

As to the work done, the chief engineer, McMurtrie, says, folio 154, he "noticed a hundred yards of masonry, a retaining

"wall and four or five hundred yards of material had been "moved and a road-bed partially graded for three hundred "to five hundred feet. The first hundred feet from lower "end of the cañon, I should think, was from six to seven "feet wide, the next hundred, eight, the next two hundred, "run all the way from a foot and a half wide, up to four "feet." Further on, at folios 178 and 179, he admits that when he run the line through the gorge, he was at work for the Union Contract Company, and that the Union Contract Company paid for the work. At folio 183, he testifies that he never did any thing more on this route, from 1872 till 1878. At folio 187 of evidence, he testifies that the men put to work by the Denver & Rio Grande Railroad Company, in 1871, were put to work at the upper end of the cañon, for the purpose of securing the line, and there were three or four men, and they laid up a wall; that the work was at the upper end of the gorge and run up the gorge, (folio 190). The two Brewsters, (folios 227 and 229), and Thornton, (folio 256 and 261), and Robinson, (folio 264,) and all the other witnesses who show what work was done; by the latter, it appears three men worked in May, 1871, twenty-two days, this is all the work done either in grading or surveying a preliminary line of nine and one-quarter miles, and five hundred yards of earth moved, three men, for twenty-two days only employed.

Now if this survey and work gives to appellant the better right to the cañon, it must be because they show such an occupation and appropriation of the cañon as excluded the appellee entirely from it, or gave it the right of choice of route; that this is not shown by such survey and working, is, we think, as Judge Hallett in his opinion remarks, "clear enough on reason and authority."

Merritt vs. Northern R. R. Co., 12 Barbour, 606.
Morris & Essex R. R. Co. vs. Blair, 1 Stock., 635.

Besides, the evidence shows that not only was no work done on the line from May, 1871, up till the 19th of April, 1878, after surveying, platting, and filing of appellee's line, but the remarks of Judge Hallett, (record, folio 201), are amply borne out and sustained by the testimony of Weitbrec, (evidence, folio 325, *et seq.*,) Greewood, (folio 361), of Rockafellow, (folio 469, *et seq.*,) and exhibits, (folios 533 to 545). That the appellant halted for three years at the base of the mountains, and that it reached the San Luis valley by a route other than that by the Royal Gorge, and more than this, the same evidence last referred to, shows that in 1875, the appellant had wholly abandoned the route through the gorge, as a main line, and that until April, 1878, had treated the line from Pueblo to Cañon City as a branch, with no apparent intention of ever extending it a foot beyond Cañon City. All this, taken in connection with the character of the survey and of the work done, makes it "clear enough" on the facts as well as authorities and reason, that the appellant's rights were not superior to those of appellee by nature of any thing done by it prior to April 19, 1878.

To the fifth proposition, "that by resumption of survey on the 19th of April, 1878, appellant's rights relate back to the date of grant, *for a reason peculiar to the present case*," we say, if it does thus relate back it *must* be for a peculiar reason, for it can not be held to so relate by any ordinary course of reasoning on the facts in this case. The rule referred to by counsel as to several acts to be done at different times, and the effect of completion of all, is well established, but it has little, if any, application to the case at bar. Counsel say, "at the date of the grant the company was already employed on the work of construction," but the evidence shows that work had but just commenced on the main line, near Denver, that no work had been done at any point above Pueblo, or south one hundred miles, in May, 1871, and no work was done above Pueblo, until 1872, that it was then completed to La Bran in 1872, and to Cañon City, in

July, 1875; a delay of two years and nine months between La Bran and Cañon City, a refusal to build beyond La Bran except upon an indemnity by the citizens, and then an entire apparent abandonment of the whole route up the Arkansas, until April 19, 1878. Surely the reason must be peculiar that would induce any court to hold that the resumption of work thus abandoned, coupled with surveying a preliminary line and the removal of a few hundred yards of dirt in 1871, gives the appellant any valid title to such route.

The sixth proposition is, as to incorporation of appellee. A duly organized company is one organized by a substantial compliance with the laws from which it derives its right of being. That there was such substantial compliance with the law does not admit of a question, and the circuit court very properly so found. See also—

Spring Valley Water Works vs. San Francisco, 22 Cal., 434.
Ex parte Spring Valley Water Works, 17 Cal 132.

Beside, the company had gone into operation and was in actual use of its franchises, and in such a case every intendment is to be taken in its favor.

Dunning vs N. A. & S. R. R. Co., 2 Ind., 437.
People vs. S. & V. R. R. Co., 45 Cal., 306.

Beside, the attack here made upon appellee's corporate character is a collateral one and it is not favored in law.

O. & V. R. R. Co. vs. Plumas Co., 37 Cal., 355.
C. L. & C. R. R. Co. vs. D. & V. S. Co., 75 Ill., 113.
Randall vs. Fay, 32 Cal., 354.
Tarbell vs. Page, 24 Ill., 48.

The seventh proposition is, that appellee is not a *bona fide* corporation and not entitled to the benefits of the Act of 1875. But as the whole reasoning by which this conclusion is supposed to be reached, is hypothetical, not based upon

any facts, and plain'y put upon the ground that the company was to receive, and did receive aid from some other railroad company before then organized and in operation, without showing how that fact, if proven, invalidated its claim to be a *bona fide* corporation, we leave it with the single remark that the conclusion can not be supported by the facts.

The eighth proposition, is that the appellee "took nothing by its survey and map because not in compliance with the Act of March 3, 1875." This, too, we submit as a question of fact, about which there is no dispute, upon which the conclusion of law as expressed by the circuit court, and as expressed by the approval of such map and plat by the Secretary of the Interior, is unquestionably correct. All that was necessary, was so to locate, plat and designate the line, that it might be readily found by parties entitled to know what portion of the public domain had been appropriated, and this was certainly done.

As to the ninth proposition, we need only to say that having no equities, as against the appellee, the appellant had no right to an injunction, and there was no error in refusing it; while as to the tenth proposition the objection is too general to merit either the attention of the court or counsel, and we pass it with the remark, that even if there was error, the case would not be reversed for that reason if the court could see that the judgment of the court below was clearly right, and this rule is too well established to need any citation of authorities in its support.

In the argument filed by Mr. Grant, we find no points other than those already referred, nor any authorities calling for comment, not hereinbefore alluded to. In conclusion, we may be allowed briefly to state our position on the question here presented, as to the rights of the parties hereto.

First—We hold that the Act of 1872, if taken as a grant, is to be construed most strongly against the grantee.

Second—That grantee being an incorporated company, takes no rights by implication.

Charles River Bridge vs. Warren B., 11 Pet., 420.
Binghampton Bridge Co., 3 Wall., 51.
Turnpike Co. vs. State, 3 Wall., 210.
Rice vs. R. R. Co., 1 Black., 358.
Ohio Life Ins. Co. vs Debolt, 16 How., 535.
Richmond R. Co. vs. Louisa R. Co., 13 How., 81.

Third—That the right claimed by appellant, being a right claimed under the government, and now set up against it and its grantee, the right must be so clearly defined as to leave no question of the purpose of Congress to confer it.

Leavenworth, etc., R. R. Co., vs. U. S., 2 Otto, 740.
Dubuque & P. R. R. vs. Litchfield, 23 How., 66.
Rice vs. R. R., 1 Black., 380.
Charles River B. vs. Warren B., 11 Pet., 420.

Fourth—That the grant expressed in said Act was merely a license to go upon the public domain and acquire right of way, and an immunity from action for trespass; and that such a license was revocable at any time before the right to be acquired had vested.

N. R. R. Co. vs. Gould, 21 Cal., 260.
Wood vs. Leadbetter, 13 M. & W., 837.
Fentiman vs. Smith, 4 East., 107.
Riche vs. Kelly, 1 Greenleaf, 117.
Washburn on R. P., 542.
Washburn on Easements, 2, 7–24.
Rerrick vs. Kern, 14 S. & R., 267.
Cook vs. Stearns, 11 Mass., 533.
Manford vs. Whitney, 15 Wend., 380.

Fifth—That there was no sufficient description of the

land to divest the government from granting a right of way to be acquired by another company.

Shipp vs. Mills, 2 Wheat., 322.
Johnson vs. Parnel, 2 Wheat., 216.
Black vs. Doherty, 5 Wheat., 36.

Sixth—That the government was not divested of its right to the land by the Act of 1872, so as to place the land beyond control of Congress, since the rights are *not* expressly secured to it, and are not essential to the existence of the corporation.

2 Redf. on R., 408.
Charles R. B. vs. Warren B., 11 Pet., 420.
State vs. Noyes, 47 Me., 189.

Seventh—That the Act of 1875 applies as well to companies formed before its passage as those formed afterwards, and this right of way could be acquired after the passage of that Act by *no* company or corporation whose line had not been determined, except upon compliance with that law, and the appellant was as much bound by that Act as appellee.

Laws of Congress, March 3, 1875.
Peters vs. I. M. Co., 23 Mo., 107.
N., A. & S. R. vs. McNamare, 11 Ind., 543.
Hancock vs. Richin, 11 Ind., 48.
Beekman vs. Saratoga R., 3 Paige, 45.
Baltimore & Susq. R., vs. Nesbitt, 10 How., 395.
Roxbury vs. B. & P. R., 6 Cush., 424.
Bangor & O. R. vs. Smith, 74 Me., 34.
Monongahela Nav. Co. vs. Corl, 6 Penn, St., 379.

Ninth—That not having complied with the law of 1875, the appellant had no right superior to that of appellee.

Hazen vs. Boston & M. R., 2 Gray, 380.
Charleston R. Co. vs. Co. Com., 7 Metcalf, 78.
Boynton vs. Peterboro R., 4 Cush., 469.
B & P. R. vs. Mid. R., 1 Gray, 359.

Lastly, that if appellant ever had any right of way up the Arkansas above Cañon City, they abandoned it, as the evidence shows, in 1875, and that on both the ground of lack of right ever had, and abandoned if had, appellant had no equities in this case, and the judgment of the circuit court should be affirmed.

H. M. TELLER,
WILLARD TELLER,
G. B. REED,
for Appellee.

IN THE

upreme Court,

OF THE

UNITED STATES.

TOBER TERM, A. D. 1878.

E DENVER AND RIO GRANDE
RAILWAY COMPANY,
Appellant,

vs.

ENEZER T. ALLING, *et als,*
Appellees.

Brief and Argument for Appellees.

H. M. TELLER,
WILLARD TELLER,
G. B. REED,
for Appellees.

hipple & Pierson, Printers, McClelland's Block.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1878.

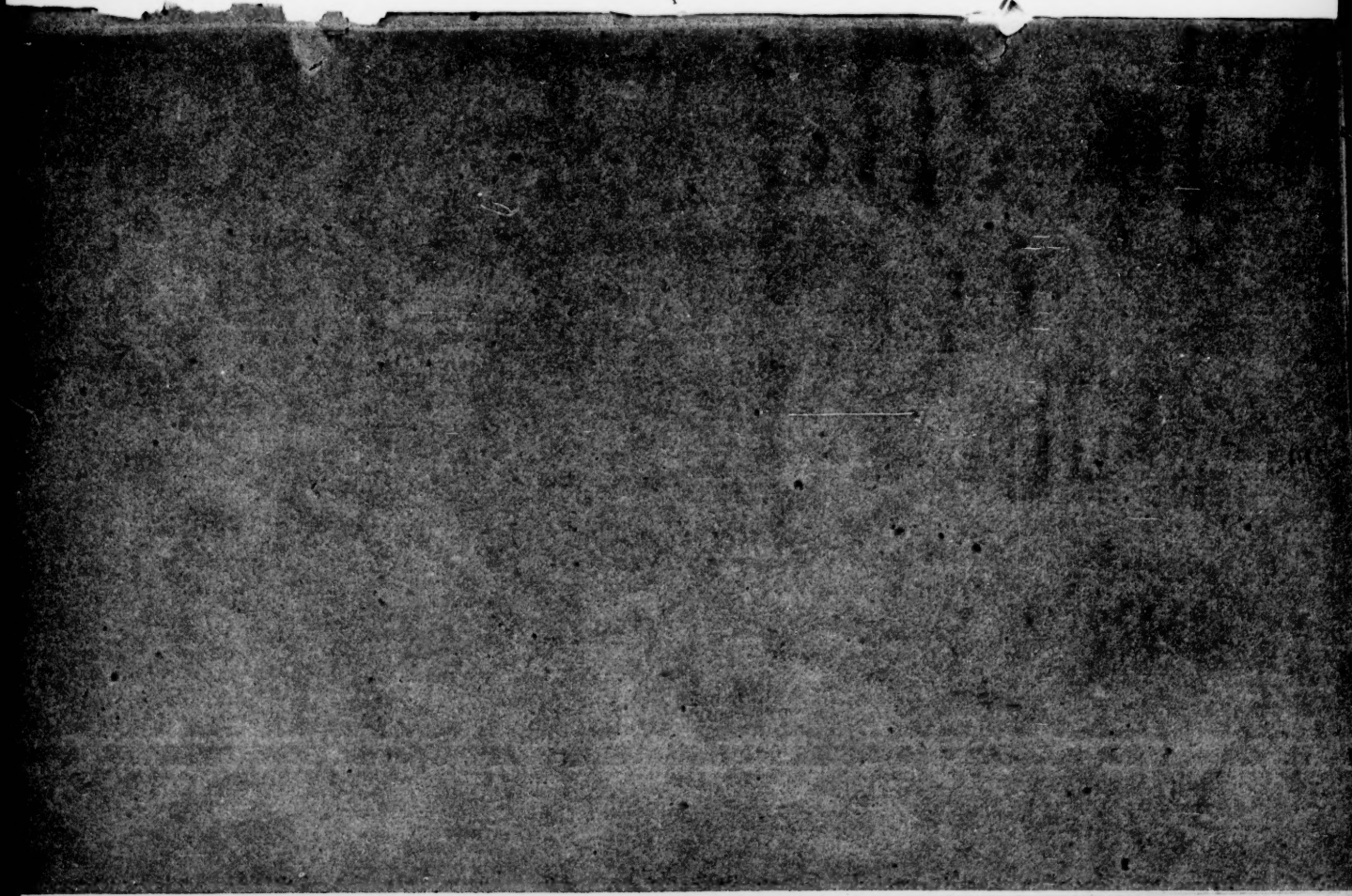
THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY, APPELLEE,
vs.
THE DENVER AND RIO GRANDE RAILWAY COMPANY, APPELLANT. } No. 812.

THE DENVER AND RIO GRANDE RAILWAY COMPANY, APPELLANT,
vs.
EBENEZER T. ALLING, ET AL., APPELLEES } No. 811.

Appeals from the Circuit Court of the United States for the District of Colorado.

ARGUMENT FOR APPELLEES.

CHARLES E. GAST,
Solicitor.



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STATEMENT OF THE CASES.

The above two causes involve the same matters of controversy, and by stipulation are to be argued as one.

The Cañon City and San Juan and the Denver and Rio Grande Companies are both railway corporations, organized under the general incorporation laws of Colorado. On the 19th day of April, 1878, the former company filed its complaint against the latter, in the District Court of Fremont county, Colorado, asking for certain injunctive relief. An injunction issued according to the prayer of the bill, and the case was afterwards removed into the Circuit Court of the United States upon the petition of the Denver and Rio Grande Company. After the first removal, the cause was remanded to the State Court, for reasons which it is unnecessary to discuss. The second petition, upon which the cause was successfully transferred, is found in folios 61 to 84 (Case No. 812). It states a case arising under the laws of the United States, such as was deemed proper for Federal cognizance.

After the removal of the cause the Cañon City and San Juan Company filed an amended bill (folios 115 to 152, No. 812), the material averments of which are as follows:

That the plaintiff on the 17th day of February, 1877, became incorporated under the laws of the State of Colorado; that such incorporation was effected by the signing and acknowledgment of a certificate, and by filing the same with the Secretary of State, and in the office of the recorder of Fremont county, (copy of the certificate attached as an exhibit); that the corporate purpose of plaintiff is to build and maintain a railroad from Cañon City, Colorado, through the Grand cañon of the Arkansas river,

and by the most practicable route, following the Arkansas river to a point known as the South Arkansas post-office; that immediately after its organization, to-wit: in the month of April, 1877, it proceeded to survey and definitely locate its line, and designated such location by stakes; that in order to secure the right of way from the Government of the United States under the provisions of the act approved March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States," it filed a plat and profile of its line with the register of the proper land office, within twelve months after such survey, and that the same was afterwards approved by the Secretary of the Interior, and the line noted upon the township plats in the local land office; that the lands over which the line is located are public lands, and not specially reserved from sale; that after plaintiff had taken possession of its line and commenced the work of construction, and after the approval of its plat of right of way, the Denver and Rio Grande Company on April 19, 1878, invaded the possession thereof with a force of workmen, removed the grade stakes, and commenced to establish a different grade with intent to delay the construction of plaintiff's road; that plaintiff's line, as located for twenty miles above Cañon City, runs through what is known as the Grand cañon of the Arkansas river, which is very narrow and inclosed in precipitous rocks, and that the difficulties of establishing a grade through the cañon are very great; that plaintiff has several hundred men employed in grading its road-bed with all possible dispatch, and that if defendant is allowed to proceed in its wrongful acts, it will greatly hinder and delay the completion of the road; that defendant's workmen have been furnished with arms and ammunition, and threaten to shoot the employés of plaintiff if they attempt to hold possession of its located line; that plaintiff's workmen are prevented by force from entering and going up said cañon; that they are prevented by force from prosecuting their work, and that the injury for various reasons is irreparable; that defendant is wholly

insolvent, and has never acquired a right of way over said line. Prayer for subpœna and injunctive relief.

A short time prior to the filing of the above amended bill, in which the Cañon City and San Juan Company is plaintiff, the Denver and Rio Grande Company filed its bill, presenting the same litigation and asking affirmative relief against the Cañon City and San Juan Company, or rather the incorporators thereof and other defendants. The bill is in form original, although as litigating the same subject matter and substantially between the same parties, it was treated for purposes of argument as a cross-bill.

Several amendments were filed to it, and in its amended form, its material allegations are as follows: The plaintiff became incorporated on October 27, 1870, under the laws of the State of Colorado, for the purpose of constructing a railroad commencing at Denver, extending to various points and in various directions, and among others, through the Grand cañon of the Arkansas river. The description of the main line of the road and its numerous branches is very lengthy, and reference may be had to the certificate of incorporation which was made part of the bill by stipulation contained in folios 73 to 97, case No. 811; that on June 8, 1872, Congress by a certain act entitled "An act granting the right of way through the public lands to the Denver and Rio Grand Railway Company," gave to the plaintiff the right of way, one hundred feet in width over the public domain, and ratified its corporate powers as conferred by the laws of Colorado; that the condition attached to such grant of right of way was that plaintiff should complete its railway to a point on the Rio Grande as far south as Santa Fé within five years from its passage of the act; that by an act of Congress, approved March 3, 1877, the period of five years aforesaid was extended to ten; that at the date of the passage of the act of June 8, 1872, the plaintiff's certificate of incorporation was a matter of record; that the Grand cañon of the Arkansas river was and still is situate upon public land; that for a distance of one and a quarter miles it does not exceed forty-five

feet in width, so that not more than one railroad of plaintiff's width of right of way could be constructed through the same, all of which was well known to Congress; that relying upon this grant, which plaintiff claims to be an exclusive right to occupy the cañon, it completed its railway from Denver to Pueblo, and afterwards in 1875 extended the same to Cañon City, which is situated near the entrance of the Grand cañon; that previously thereto, in the years 1871-2, it surveyed a line through the Grand cañon, and throughout the entire length designated the location by substantial stakes, and in sundry places graded the roadbed, of all which the defendant had notice; that on April 19, 1878, having procured the means, it began or resumed the work of constructing. The bill then avers the incorporation of the Cañon City and San Juan Company, but charges that its certificate is insufficient to confer corporate rights on the persons named in the certificate. That the defendants, pretending to be a corporation, did on April 19, 1878, take possession of the cañon, commence the construction of a railroad, and threaten to dispossess plaintiff from its located line; that only one railroad grade can be constructed through the said narrow portion of the cañon (described as the Royal Gorge, one mile and a quarter in length), and if plaintiff is dispossessed, the injury will be irreparable; that defendants do not claim to occupy the cañon under any grant or permission from plaintiff, but under the act of Congress, approved March 3, 1875; that the Cañon City and San Juan Company, has never surveyed its line through the narrow part of the cañon (the Royal Gorge), and that in other respects it did not comply with the terms of the act; that there is no other practical route for plaintiff's railroad up the Arkansas river, save through the Grand cañon, and that it has always been its purpose to extend the same up the river, but that until the present time the probable traffic would not justify the extension; that the Cañon City and San Juan Company, or its incorporators, are aided and abetted by the Atchison, Topeka and Santa Fé Railroad

Company, a Kansas corporation of large means, and that the acts of invasion are in fact those of the latter company; that the incorporators of the Cañon City and San Juan Company are fraudulently and collusively lending the name of the latter company to enable the Atchison, Topeka and Santa Fé Company to harrass and oppress the plaintiff; that the road when built will be the property of the Atchison, Topeka and Santa Fé Company. Prayer for relief, that the defendants be enjoined from occupying the Grand cañon of the Arkansas river, or from interfering in any way with the plaintiff's right of way therein to the extent of one hundred feet in width on each side of the line.

It is deemed unnecessary to abstract any further pleadings filed in the cases, for the reason that the answers of the several parties present to all intents and purposes the same allegations substantially as those contained in the bills. In addition to filing the original bill against the incorporators of the Cañon City and San Juan Company, joining as defendants the Atchison, Topeka and Santa Fé Company and some of the officers thereof, the Denver and Rio Grande Company subsequently filed a cross-bill to that of the Cañon City and San Juan Company, which is to be found on folios 236 to 284, case No. 812. An inspection of the same shows that it is a mere repetition of the same subject matter presented by the original bill. The facts averred are the same, and the relief prayed for identical, except that in the cross-bill relief is asked against the Cañon City and San Juan Company, and in the original bill, against the incorporators. In other respects the litigation presented by the two bills is precisely the same, and for this reason and because the Denver and Rio Grande Company had elected to proceed by an original bill, the cross-bill was very properly stricken from the record, as being an unnecessary repetition of the same issues.

Argument was heard upon motion for a preliminary injunction, and both companies were placed under restraint

until the matters could receive the mature consideration of the court. Afterwards, there were filed in the cause the opinions of Judges Dillon and Hallett, and the injunctions were so far modified as to permit the Cañon City and San Juan Company to proceed with the grading of its road-bed, the court reserving the right to correct and change the location upon complaint of the Denver and Rio Grande Company, that its rival was unfairly monopolizing the cañon in such a manner as to exclude it therefrom. The Denver and Rio Grande Company was permitted to proceed with its work in all parts of the cañon except the Royal Gorge, as to which it was conceded that the width was not sufficient to admit of two roads. The opinions of the court were to the effect that the Cañon City and San Juan Company had a prior right to its located line, but that it would not be permitted to appropriate all the available ground, if it was possible to admit the Denver and Rio Grande Company to the same right of way, and that the court, upon a proper showing, would control the construction of the former road accordingly. For this reason, as there were no serious difficulties in the way of admitting both roads to all parts of the cañon except the Royal Gorge, both were permitted to proceed in all other parts; but as to the Royal Gorge, where it was deemed impossible for two sets of graders to work conveniently or safely, the Denver and Rio Grande Company was restrained.

After issue joined, evidence was taken in open court by stipulation, and on the 24th day of August, final decrees were entered in both cases, as follows: Permitting the Cañon City and San Juan Company to complete its rail-road through the Grand cañon, upon its located line, as the same is exhibited by its plat bearing the approval of the Secretary of the Interior, and restraining the Denver and Rio Grande Company from interfering with the construction, but with liberty to the latter company to build its road, within or without the right of way of the Cañon City and San Juan Company, crossing it at grade if neces-

sary, provided it do not use the privilege in such a way as to obstruct the operations of the Cañon City and San Juan road; and with liberty, at any time, to exhibit its bill to compel the Cañon City and San Juan Company to adhere to its platted line, or to so change its line as to permit the convenient location of another, or for permission to use the same track or road-bed with the Cañon City and San Juan Company. As regards the Royal Gorge, the Denver and Rio Grande Company is restrained from constructing any part of its line upon the same side of the river with the other company, until the latter shall have completed its road-bed, for which purpose six months' time from the rendition of the decree is given.

The most important question arising upon these records is, as to the proper construction to be applied to the act of June 8, 1872 (17 Stat., 339). Did it confer on the appellant an immediate vested right in the land over which it might thereafter select its way, and are all subsequent grants and acquisitions from the Government subordinate to it? Did it vest a present beneficial easement in a particular way which the appellant may select and appropriate at any time prior to the year 1882, and the title to which, when located, relates back to the passage of the act, discharged from any adverse interest or occupation acquired subsequent to the date of the act? Or did it confer a mere license to enter upon the public domain and appropriate a particular way, assuming the lands to be vacant at the time of appropriation?

If the latter position is correct, had the Denver and Rio Grande Company in fact appropriated a location through the Grand cañon of the Arkansas river prior to the approval of the right of way to the Cañon City and San Juan Company, under the act of March 3, 1875?

If the Circuit Court properly resolved these questions, it is difficult to see in what respect the decrees entered are at all inequitable.

I.

It will be observed that the bill in which the Denver and Rio Grande Company is complainant disputes the legality of the incorporation of the Cañon City and San Juan Company, and asserts that the certificate signed by Ebenezer T. Alling et al. was utterly void, and hence conferred no corporate capacity on the persons named therein. The alleged imperfections in the certificate of incorporation are stated by the bill to be, "that said certificate did not in any manner show or set forth the name of the town, or place, or county in which the principal office of the company shall be kept, nor the number of trustees who should manage the affairs of said company save during the first year." (Folio 18, No. 811).

The act of the Colorado Legislature, approved February 11, 1876, (Session Laws of 1876, page 41), was the law in force at the time of the incoporation of the Cañon City and San Juan Company, and hence is to govern in determining whether the certificate is a sufficient compliance with the terms of the act. It is important to notice that the act is very general, and is made applicable to all manner of corporations, manufacturing, mining, mechanical, railroads, telegraph lines., etc., etc. It provides, among other things, that the certificate shall state "the number of trustees of said company, and their names, who shall manage the affairs of the company for the first year of its existence, the name of the town or place and the county in which the principal office of the company shall be kept, and the name of the county in which the principal business of the company shall be carried on."

The first alleged defect, whereby as claimed by the bill, the Cañon City and San Juan Company did not come *in esse* as a corporation scarcely deserves consideration. A glance at the certificate (folio 67, No. 811), shows that it is a literal compliance with the statute in that regard. It states that the number of trustees who shall manage the business concerns of the company for the first year shall

be nine, and gives the names of the persons who are to act in that official capacity. The act does not require that the certificate shall designate *for all time* the number of trustees. Such a requirement would work great inconvenience for the reason that the needs of a company in this respect vary with its growth, and if the number of trustees is fixed for all time by a charter provison, there is no provision in the law making the certificate amendable in this or any other regard. The purpose manifestly was, and such is the express language of the law, that the certificate should define the number of trustees, and give their names, having control of the company's affairs for the first year; leaving the frame of the corporation, as to trustees and officers, to be thereafter regulated by the stockholders, where the power rightly belongs, in such manner as their best interests demand. The trustees are but the agents of the stockholders, delegated to act for certain purposes, and the legislature could have had no good reason in requiring the charter to state, at the inception of the enterprise, the number to whom, for all time, the management should be committed. The natural and ordinary import of the language used expresses a contrary intent.

The bill complains, further, that the certificate does not state the name of the town where the principal office of the company shall be kept. In answer to this, we submit that the statement in the certificate that the "principal place of business shall be Cañon City, in the county of Fremont," is a substantial compliance with the law.

A substantial compliance is all that is required, and not literal exactness.

> *Ex parte*—Spring Valley Water-works, 17 Cal., 132, Spring Valley Water-works vs. San Francisco, 22 Cal., 434 and authorities there cited.

In the case of Harris vs. McGregor, 29 Cal., 124, cited by appellant, there was such a departure from the statute, that there could be no pretense that the certificate was

sufficient to call a corporation into being. It designated simply the county and State where the "operations of the company were to be carried on," whereas the law required a statement of the city, town and county in which the "principal place of business" was to be located. The court says, however, in commenting upon the phrase "principal place of business," that it contemplates the place where the "principal office" is kept. The one statement is the equivalent of the other. If by any refinement an intelligent distinction can be drawn between the meaning of the two phrases, it certainly can be given no application in the case of railroad companies; for, as Judge Hallett very properly says in his opinion, (folio 165), "a railroad company having business all along its line has no *principal* place of business, other than its general or principal office." Its route may traverse several counties; it does business in all of them; it receives freight and passengers wherever they are offered along the line; and in a *legal* sense, no county or town can be its principal place of business, except as it may have its principal office there.

It is true that the principal office of a corporation is ordinarily understood to be the place where its corporate records are kept and where its stockholders convene for corporate action, and when the phrase is applied to a railroad company, it is tantamount to designating such place as its "principal place of business."

II.

Conceding for the argument that the certificate of incorporation is not a substantial compliance with the law, is it open to a collateral attack? It is true that the statute mentions certain things to be done, as necessary to create a corporation, and in that sense, as is claimed by appellant, they may be considered as conditions precedent; but it is not every case in which the non-performance, or the irregular performance of any of them can be availed of collaterally.

O. & V. R. R. Co. vs. Plumers Co., 37 Cal., 355.
Turbell vs. Page, 24 Ill., 48.
Randall vs. Fay, 32 Cal., 354.

Every intendment is to be taken in favor of corporations that have gone into operation, and are in actual *user* of their franchises.

Dunning vs. N. A. & S. R. R. Co., 2 Ind., 437.
People vs. S. & V. R. R. Co., 45 Cal., 306.

The true rule seems to be, that where a body of men claim in good faith to be a corporation; where they in good faith have filed articles under a general law, although the same may be defective; where they have been recognized as a corporation by a grant made to them by a sovereign power; where they are in operation as such corporation, and in actual user of their franchises, they are a corporation *de facto*, and they must be attacked, if at all, in a direct proceeding by the State.

The evidence throughout shows that the incorporators of the Cañon City and San Juan Railroad Company organized in good faith, hoping to enlist capital to build the railroad described in their certificate. They adopted by-laws, elected officers, held regular meetings of the directory, received stock subscriptions, procured surveys to be made of the route, filed a plat of the line, and received, by the approval of the same by the Secretary of the Interior, a bounty of the Government bestowed only upon corporations. On the 10th day of April, 1878, they begun the actual grading of the road-bed, and have ever since proceeded diligently in their enterprise. They have not only assumed a corporate character, but they have done so in good faith, under color of law, and with a Government recognition; and being in actual user of the franchises thus conferred, no one can assail the capacity in which they act, or question their alleged usurpation, except the sovereign State.

If a corporation effects a preliminary organization and

adopts a code of by-laws, and in good faith thereafter acts as a corporation, it becomes a corporation *de facto*, although a final organization is not effected; and if such corporation is in possession of a highway, under grant of a franchise, a trespasser cannot justify his entry thereon, on the ground that the corporation was not *de jure* entitled to the franchise.

S. & L. J. G. R. Co. vs. S. & C. R. R. Co., 45 Cal., 680.

Where a set of men claiming to be a legally incorporated company, under an act of the Legislature, have done everything necessary to constitute them a corporation—colorably, at least, if not legally—and are exercising all the powers and functions of a corporation, they are a corporation *de facto*, if not *de jure*, and the court will not in an incidental way treat them as a body having no rights or powers.

Attorney-General vs. Stevens et al., 1 N. J. Equity R., 369.

In C. L. & C. R. R. Co. vs. D. & V. R. W. Co., 75 Ill., 113, in a suit brought by a corporation, it was attempted to question the rightfulness of the plaintiff's corporate existence. The plaintiff had been organized under a general law providing for the formation of railroad companies, had prepared and filed with the Secretary of State articles of association, and was in actual possession and user of the franchise with which it claimed to be invested. The suit involved the exercise of the right of eminent domain. The court held that the association became a corporation *de facto*, and that alleged defects in its organization could not be inquired into collaterally.

The case of Bigelow vs. Gregory et al., 73 Ill., 197, cited by appellant, is wholly inapplicable as an authority to the case at bar. The defendants were sued as co-partners, and claimed to be exempt from individual liability by reason of having become a corporation. The general law required a certificate setting forth certain things to be filed and pub-

lished. The defendants, at the time of incurring liability, however, had never filed or published *any* articles, although the same had been previously executed. It was held, very properly, that, until the articles were in fact filed, they were nothing more than articles of agreement between the parties signing, and would not of themselves confer corporate capacity. "The right of the defendants to be considered a corporation depends upon their having complied with the requirements of the statute, at least to the extent of the publication of their articles of association and the filing of the certificate. These are important acts as affects the public interest, as affording means of notice respecting the corporation to such as deal with it, so that they may regulate their action and give or withhold credit accordingly."

III.

As before remarked, the vital question to be determined is as to the proper meaning of the act of Congress of June 8, 1872. Counsel for appellant starts with the broad proposition that "it conferred upon the Denver and Rio Grande Railway Company, in all parts of its line, an immediate and vested interest in the land which it has since selected for its way." The reasoning appears to be that the language of the act imports the grant of a present beneficial interest, and not the mere promise of a grant *in futuro;* and that although the line of the road had not been ascertained and located with sufficient certainty at the time of the passage of the act, so that, in a present sense, the grant could attach in a particular way by description, yet that, when definitely located, by calling into aid the doctrine of relation, the title enures to the specific selected route as of the date of the grant, without regard to subsequently acquired interests.

Whatever meaning is attributed to the act, the court will be governed by the well-recognized principles upon which public grants always receive their interpretation. Whatever is not granted in plain, unequivocal words is withheld.

If the intent of Congress in making a legislative grant is open to an intelligent doubt, or if there be any ambiguity in the terms of the contract, it must operate against the corporation, and in favor of the public. In other words, legislative grants for private purposes are never extended, by construction, beyond what is necessary to give a reasonable effect to the intention of Congress.

Rice vs. Railroad Co., 1 Black, 358.
Com. vs. Erie & N. E. R. Co., 27 Penn., 339.
Charles River Bridge vs. Warren Bridge, 11 Pet. 544.
Leavenworth R. R. Co. vs. U. S., 2 Otto, 740.

It may be admitted that the phraseology of the act, "the right of way over the public domain be, and the same is hereby, granted and confirmed," is operative to pass a grant *in presenti*, even though the thing granted needs further acts to be done by which it may be identified and known. This same language has been so frequently construed, and the above conclusion reached, that the general principle is no longer open to doubt. This conclusion, however, standing by itself, is of very little value in determining the controversy, for the reason that it must still be ascertained what was intended to be granted. It settles nothing to define the grant as a present one; the vital question still remains: Was it a grant of an immediate beneficial interest in a strip of land, two hundred feet in width, and to be selected *in futuro*; or was it a grant of a present right to enter upon the public lands, assuming them to be unappropriated at the time of entry, and thereafter occupy them for the purposes of a railroad? Was it a grant in the present in fee, or during the life-time of the corporation, of such depot grounds, not exceeding twenty acres at any one station, which the company might, at any time prior to the year 1882, select upon the line of route, upon lands which at the date of the act were unoccupied; or was it a grant of a privilege to select such depot grounds upon public lands which at the time of the selection had not been alienated by the Government? Upon either theory it may be

said that the grant operates *in presenti*—in the one case, to pass an immediate vested interest in the land which the company may select for its right of way, provided the selection is made prior to the year 1882, thus having the effect practically of withdrawing from disposition and sale by the Government the entire scope of country which the road is permitted by its charter to traverse; in the other, to pass an immediate license to enter upon public lands, and acquire a certain easement upon the location and construction of the road.

That the act does not purport to pass a particular way by description, is too plain, we think, to admit of serious argument. By a reference to the certificate of incorporation, it will be seen that the railway system which the appellant is authorized to construct is one of great magnitude The several routes are designated as a main line, commencing at the city of Denver; thence, by various courses, following the valleys of certain water-courses, until a terminus is reached at El Paso, in the Republic of Mexico. No effort was made apparently to give certainty to the description; the lines are defined generally as extending through valleys, and from place to place, leaving a more particular route to be determined upon after a detailed survey. Connecting with this main line are eight different branches, extending in every conceivable direction, and through almost every mountain pass or cañon in the Rocky mountains through which it was then thought possible to construct a railroad. In some instances an election is taken even as to these vague, general routes. For instance, the fourth branch describes a line "commencing at a point on said Denver and Rio Grande Railway at or near the mouth of the South Arkansas river; thence, up the valley of the main Arkansas, to the summit of the range dividing the waters of the Arkansas and the Grand River of the West; thence, by the valley of the Grand, or *such other tributary* of the Great Colorado river as may be found most practicable and eligible with a view of developing the mineral and agricultural wealth of Western Colorado, to a point on the western

boundary of Colorado; and thence, by the most eligible route, to Salt Lake City."

Some of the water-courses along which the route extends include valleys exceeding fifty miles in width, in any part of which the road may be located. It is clear, then, that the grant lacks that degree of certainty which is necessary to have it attach, *propria vigore*, to specific parcels of land. Of itself, it affords no notice to charge any particular lands with an easement. To acquire precision there must be an adopted, determinative line, upon the face of the earth, and then for the first time the subject-matter of the grant comes into existence.

8 Opinions Attorney-General, 244.

In order to pass a present vested interest in land, there must be such a description as affords notice of the appropriation made.

Johnson vs. Pannel, 2 Wheat., 206.

It is claimed, however, that when the company selects a definite location, and appropriates the same, that the title vests, by relation, as of the date of the grant. It is difficult to see upon what sound principle this claim can rest. "The doctrine of relation," remarks Justice Field, in Gibson vs. Chouteau (13 Wall., 99), "is a fiction of law adopted by the courts solely for the purpose of justice." It is applied where a series of acts are to be performed in order to vest a title, and, where all of them have been performed in good faith, the title becomes perfect as of the time when the first act was being commenced. If given any application, therefore, in construing the act of June 8, 1872, the result would be: The act gives the Denver and Rio Grande Company the right of way over public lands, the right to take materials therefrom, station grounds, etc. The company may enter upon the public lands and select its way; if it locates a line, selects its depot grounds, and follows up its selection by an actual appropriation in good faith, its title then be-

comes vested and perfect in all respects; and as against third persons, the title will relate back to the time of the selection. In other words, the title is acquired by actual occupation and construction of the road. To effect this, a series of acts are necessary. When all are performed in good faith, the title relates back to the first act of appropriation. In this way justice is done both to the company and to the actual settlers upon the lands. By no proper reasoning can the relation extend back to the date of the grant.

Pursue this theory logically, and to what results does it lead? The only limitation or condition imposed upon the company was that it should complete its railway to a point as far south as Santa Fé within five years of the passing of the act, and thereafter complete fifty miles additional south of said point each year. This has reference only to the main line of road, and upon the numerous branches there is no burden of this or any other character imposed. Practically, then, all public lands coming within the possible operation of the grant are charged with a perpetual easement, which the appellant may assert at any time. Good faith on the part of the Government toward settlers would require that all the lands which might probably be affected by the grant be withdrawn from any disposition or sale. Yet the act makes no provision for this withdrawal, nor was it the rule in the Land Department to so withdraw them. To have done so in this particular case would have been to arrest all growth and development in the then Territories of Colorado and New Mexico—for the reason that a very large proportion of the land available for agricultural purposes was liable to be affected by the grant, provided the company accomplished the objects which its charter plans.

Since the date of the act, the Rio Grande valley has become studded with flourishing and populous towns; settlers are in possession of well cultivated farms. The theory contended for implies the fact that their possession must yield to the paramount claim of the Denver and Rio

Grande Company, which, when asserted, *relates back to June 8, 1872.* Surely, this result is at variance with the entire policy of the Government, past and present, in organizing and administering its landed system, which has been to dispose of its lands to settlers unincumbered and free from every charge except such as the records disclosed.

As an escape from this *reduction ad absurdum*, it is said that these questions should be addressed to the legislative department, and that they raise simply a plea of "legislative improvidence." Not so. The construction placed upon the grant by appellant is not a necessary construction; without it, the company takes an ample bounty at the hands of the Government; and these considerations are potent to show what the real intent of the lawmakers was.

Again, everyone familiar with the physical characteristics of the country will observe that the certificate of appellant confers upon it the right to run lines of railway across every available pass, cañon or defile in the Rocky mountains, within the State of Colorado. None of these cañons and passes, it may be said, are of sufficient width to permit the construction of more than one railroad with a right of way two hundred feet in width. The Denver and Rio Grande Company, then, enjoys a monopoly of railroad building. Its right is absolute and incontestible to arrest any scheme of internal improvement, unless tribute is paid to its own demands.

For instance, a railroad company organizes for the purpose of building a line to intersect the mountains and connect Colorado with Utah. The Platte cañon is selected as a practicable route. The appellant interposes its *caveat.* Congress, it says, has granted to us the right of way through the Platte cañon; it is a present grant effectual against the Government for all time. You cannot build without buying off our franchise. If the attempt is made to cross the mountains *via* the Arkansas cañon, the Sangre de Christo, Huerfano, or Cucharas passes, the same obsta-

cle is encountered. To strengthen this ficticious claim, the appellant has perhaps run experimental surveys across these passes, for the purpose of "holding them," as is remarked in one of the arguments on file in this suit, thus giving a precision to the grant and attaching it to a specific line. Or it may be said, that Congress was familiar with the topography of the Rocky mountains, knew that these passes and cañons did not exceed two hundred feet in width, and hence that they intended to pass a way by discription and to the exclusion of all other companies.

It is true that by standing by, without complaint, appellant might create against itself an estoppel; but equally true is it, according to the argument, that the right taken by the grant is not lost by *non-user*, and hence that what Congress intended as a bounty to aid development of the country's resources becomes a barrier to defeat its purpose.

The position, therefore, contravenes the wise and well settled policy of the Government, and can rest upon no sound principle of law.

But one case has been cited that presents the semblance of authority for the theory—that when an appropriation is made by the company, the title relates back to the date of the grant.

C. P. R. R. Co. vs. Dyer, 1 Sawyer, 646.

We think that counsel have misunderstood the scope of that decision. The suit was instituted by the Central Pacific Railway Company to quiet title as against parties who claimed adverse interests to parts of its right of way and station grounds, the title of which accrued to the company under the act of July 1, 1862 (12 Stat. 489). The bill alleged that *at the time of the location of the road* all the lands intersected by the line were public lands, and that Congress had full power of disposal of the same. It is true that this averment was in a measure qualified by the further allegation, that the defendants claimed titles accruing since the date of the act. The decision was upon a demurer. The question arose upon the pleadings, and as

they stood, they were entirely consistent with the idea that the adverse titles originated after the definite location of the road. The demurer was accordingly overruled. We concede that the particular language used by Justice Field in his opinion is broad enough, perhaps, to cover this case, but when considered in connection with the facts as presented by the pleadings, we doubt whether it was so intended. If the language was intended to convey the idea that the Central Pacific Company acquired a vested right to a particular way by the mere passage of the act, and that thereafter no valid adverse titles could be acquired from the Government to any lands over which the road might subsequently be located, it is difficult to see how the doctrine can be reconciled with the opinion of Justice Field in Leavenworth, etc., R. R. Co. vs. U. S., 2 Otto, 756.

The case of Kissell vs. St. Louis public schools, 18 How., 19, is cited in this connection. There the defendant who claimed under a pre-emption perfected in 1836 was held to have an inferior title to out-lots to the Board of Commissioners of public schools, in whom the title had vested by certain acts of Congress. The pre-emptor could not be heard to say that he did not know that the particular parcel of land was reserved as an out-lot. At the time of the entry, it was within the notorious incorporated limits of the city of St. Louis, and of this he was charged with notice.

Doll vs. Meador, 16 Cal., 295, decides that California, upon her admission as a State, acquired a present vested interest in 500,000 acres of land, with a right to locate the same; that the location could be made in tracts of not less than 320 acres each upon unsurveyed lands, leaving the locations subject to change, if upon the lines of survey being run, they prove to want conformity therewith. "With this qualification," says C. J. Field, "and *the further qualification of a possible reservation by a law of Congress, or a proclamation by the President, previous to the survey*, which may require further change, or the entire removal of the location," the right of the State is complete to control and

sell the quantity of land to which she is entitled under the grant. So, upon the rehearing, the same conclusion is reached. "The selection will not, of course, become absolute and definite until the survey; until then, the parcels selected may be subject to a possible reservation from sale." The case instead of being authority for the position that the selection, when made, relates back to the date of the grant, and that intermediately the Government is debarred from interfering with parcels which may become possible selections, proceeds upon the opposite reasoning. It is clear, we think, that under the act of Congress, the locations could only be made upon lands that were vacant and unappropriated at the time of the location. The State Legislature expressly recognized this as the extent of their right.

There is also cited in this connection, the case of Sherman vs. Buick, 45 Cal., 666. The controversy there arose between two patents, one from the State of California, the other from the United States, each conveying a part of a school section. The case came under review in this court (3 Otto, 209) but was decided on other grounds than those considered by the State Court. Admitting the correctness of the conclusion of the State Court, namely, that Congress had no power, after making the grant of school sections, to impair it by recognizing pre-emption settlements thereon before survey, it is obvious that a grant of school sections is of an entirely different character than the one now under discussion. Concessions of Secs. 16 and 36 pass title in a measure by discription. Not only the quantity of land is fixed, but the precise *locus in quo*. A subsequent survey does not call the sections into existence, but simply defines their exact location in connection with the sub-divisional lines. These grants have never been regarded as mere floats. The same observations apply to grants of swamp lands. A subsequent identification may be needed to segregate the lands from the body of the public domain, and the grants provide for such listing; but the title vests, nevertheless, at the inception of the grant

by a description in general terms, which is deemed sufficient to impart notice to the outside world.

Congressional legislation in the matter of railway grants has always been based upon the assumption, that the Government retained the power to alienate within the possible limits of the grant until the precise line of road was definitely located, and provision has usually been made for this, by either granting other lands as an indemnity, or by withdrawing from sale such lands as may possibly be affected.

8 Op. Atty. Gen., 246.

IV.

The history of the act of June 8, 1872, shows that at the time of its passage, there were enacted with each session of Congress numerous bills of a like character. It was not considered the bestowment of any especial bounty.

Every railroad company, whose contemplated line was through public land, was freely given the right of way by special enactment, until by the law of March 3, 1875, (Stats. of 1874-5, page 482) all companies were granted the right, upon compliance with certain requirements. These special acts are of a two fold character. In one class, the duty is imposed upon the company of filing a plat, which shall stand as a designation of the route, and which when traced upon the records shall charge settlers with notice of the easement. The necessity of this in properly administering the system by which public lands are thrown open to purchasers is apparent. (16 Stat., 395; 17 Stat., 202, 212, 224, 340, 343, 393, 612; 18 Stat., 130, 274, 306, 309.)

In another class, no such burden is thrown upon the company, and yet the policy of the Government has always been that there must be notice *in some form* of the particular land effected (14 Stat., 212, 237, 240, 290, 294; 16 Stat., 192; 17 Stat., 280). It is a reasonable inference that this notice, as it does not appear of record must appear, and was intended to appear from actual occupation.

V.

It is argued that the grant of right of way to appellant can properly receive one construction as to such parts of its line, as by reason of the topography of the country are confined within narrow limits, and another as to such parts where the line by the articles of incorporation was not described with certainty. Otherwise stated, the argument is that the cañon of the Arkansas is confessedly of a less width than two hundred feet, and that as to this part of the grant the words of Congress are to be received in a different sense than as conferring a mere right to appropriate.

Certainly, it must be admitted that Congress in making the grant had reference to the line of road designated in the certificate, and therefore knew, or was presumed to know, that the contemplated route was through the cañon. It acted upon sufficient information in this regard, but we submit that it is presuming too much to charge them up with an acquaintance with the physicial fact that the cañon was less than two hundred feet in width.

As was remarked by the learned District Judge, the grant is an entirety, and must be construed as operating in a like manner upon all parts of the general line. It is impossible to separate the intent of the law-makers, and say that their purpose was to vest a present estate in the Arkansas cañon, and confer a license as to the other parts of the line. If such is the case, the same exclusive right will pass to the company in all other important passes along the several routes—for they are all enumerated.

By referring to contemporaneous legislation upon the same subject matter—enactments made at the same session of Congress—it will be found that whenever it was intended to pass a descriptive title, or one to be rendered such by the filing of a plat showing the located line, it was expressly stated that other companies should not be precluded from constructing through cañons, passes, or defiles (17 Stats., 202, 212, 243, 293).

The general system of legislation upon the subject matter may be taken into view, in order to aid the construction of one statute relating to the same subject.

Holbrook vs. Holbrook, 1 Pick., 254.

The intention of the legislature is the proper subject of inquiry in construing a statute, and that intention may be gathered from the act itself and others upon the same subject matter.

Ezekiel vs. Dixon, 3 Ga., 146.

VI.

From the foregoing, we think the conclusion is fairly deducible, that the act of June 8, 1872, conferred upon the appellant a general authority to appropriate the public lands for its corporate purposes, thus giving it immunity for acts, which without this protection would be trespasses against the superior proprietor; and that an entry, coupled with possession and use, is necessary to an investiture of any beneficial interest in the particular lands over which the road may be built. This view is sustained by the language of the court in W. R. R. Co. vs. Gould, 21 Cal., 255. It is clear, then, that as long as the privilege remains executory, there may be valid subsequent acquisitions from the Government of right of way over the same extent of country. It is equally clear that if there is a subsequent adverse occupation of part of said route by another company, claiming under the general act of March 3, 1875, the appellant cannot thereafter impair the selection of the other company and the grant to it, by asserting any paramount right of choice by reason of its having the elder grant.

Applied to the facts of this case, had the Denver and Rio Grande Company in good faith appropriated the Grand cañon for the purposes of its road, at the time of the surveys made by the Cañon City and San Juan Company and

the approval of its plat by the Secretary of the Interior? The bill alleges that in the years 1871-2, having before that time located and completed its railroad from Denver to Pueblo, it begun to locate its line from Pueblo to Cañon City, and thence through the Grand cañon, designating the survey in the cañon by substantial stakes, and in sundry places *in* the cañon grading and excavating the bed of a railway. The proof shows the character of this *pretended* appropriation, and for what purpose it was made.

James A. McMurtrie, the Chief Engineer of appellant, testifies that in January and February, 1871, he made what he calls a "close preliminary" survey for the Denver and Rio Grande Company through the cañon (folio 147, testimony). That he set stakes every hundred feet to mark out the line, and in February, '71, placed *three or four men* to work upon the line in the upper end of the cañon. At this time, appellant was simply locating its line from Denver south. When asked upon cross-examination (folio 187) for what purpose the men had been placed to work in the cañon, his very significant answer was "for the purpose of securing that line." The testimony of *Alexander Thornton*, (folio 257) who was one of the workmen, shows that three men were employed for twenty-two days in this magnificent enterprise of building a railroad through the principal gateway of the Rocky mountain system. *William H. Greenwood*, who at the time of this survey was General Manager of appellant's road, under whose orders and control the surveys were made, and who speaks presumptively with some degree of familiarity with the management of its affairs, testifies (folio 361) that the object of this survey was to retain control of the cañon; that the intention was to do work enough to keep the right of way, if they could, because they were afraid some other company might set up a claim; that, at that time, they could not have constructed, as there was no money raised for the purpose; that afterwards, the company in constructing its line into the San Luis valley (Rio Grande valley) adopted a route from Pueblo in a southernly direction, crossing the

mountains at the Veta pass, instead of building westwardly through the Grand cañon; for the reason that the former was the shorter line, and if left open, there was danger of its being occupied by a rival company.

In fact, it seems to be admitted by counsel that the survey made in 1871, and the work performed by these three solitary graders in 1872 was of a purely *formal* character, for the purpose of precluding other companies from occupation, and with no immediate intention or prospect of following up the same by actual construction of a railroad. Thus matters stood, and the region of country west of the Arkansas cañon remained without railroad connection, or the prospect of any, until in February, 1877, the Cañon City and San Juan Company was organized, and in the spring of that year made its survey through the cañon; afterwards procuring the approval of its located line by the Secretary of the Interior, and commencing the grading of the road-bed on April 19, 1878.

The mere fact of a survey having been made by appellant through the cañon in 1871 was ineffectual to confer a vested property right which anybody was bound to respect, unless it was followed up in good faith by other acts of appropriation.

Surveying and staking a line of road is not such sufficient notice of right of way, as will charge a subsequent purchaser from the grantor of the right.

Merritt vs. Northern R. R. Co., 12 Barb., 606.

See also, Morris and Essex R. R. Company vs. Blair et al., 1 Stockton, 635, a case which in several aspects bears a close resemblance to this, where it is said: "It may be true that the complainants first actually surveyed in the passes where the conflicts occur, although there seems to be some doubt on this subject. But, assuming it to be true, the mere experimental surveying of a route will not confer any vested or legal right, until it shall have been adopted. Until then the company is in nowise committed

to it. If done by their direction, they may change their mind and go elsewhere. It may be the mere act of their engineer, and he may recommend it or not. If he should, the company may reject it and select another route. Although the complainants, therefore, may have first surveyed the conflicting passes in the mountains, yet the Warren Company afterwards surveyed the same passes, and first adopted the route, and first filed their survey in the office of the Secretary of State."

It is a common practice for railroad companies to survey and stake off experimental lines. This is sometimes done to determine the probable cost of building; sometimes to ascertain the feasibility of a certain location; but more frequently, in this western country, for the sinister purpose of inducing a false confidence on the part of people living along the line. By adopting this practice, the appellant might, by a small expenditure of money, run preliminary surveys through all the important passes enumerated in its certificate, confessedly, as this was done, for the purpose of excluding rival enterprises.

There is no evidence that the survey was ever adopted by the company, and if it had been, it could not, of itself, operate as such an appropriation, whereby the Government would be precluded from giving the right to another company under the act of March 3, 1875. The same may be said of the trifling work done by the three employees.

The United States has always demanded good faith on the part of those claiming under legislative concessions; and reasoning from analagous cases, growing out of public land controversies, where a right rests upon occupation, it must be an occupation *in fact* and not *in form*—it must be for a purpose which the law recognizes, and not simply to enforce an exclusion against others.

The fact that business was in a depressed condition, and that it was difficult to raise means to prosecute railway enterprises furnishes no answer. If the Denver and Rio Grande credit was at a low ebb, that was its misfortune. Other companies, capable of commanding aid, should not by that

fact be thwarted in prosecuting rival purposes. Nor is it an answer to say that the appellant *intended* to build through the Grand cañon at some indefinite time, when it was ready and could induce subscription of the necessary capital. Railroad managers are generally bouyant with hope, and plan for themselves magnificent extensions, to be built when they get money. It is a fact, though, in evidence, and remarked upon in the opinions of the Circuit Court, that when the appellant did raise the necessary capital to build to the Rio Grande river, it adopted a different route than that which it now purposes to build upon to reach the same destination. After building by this shorter route into the Rio Grande valley, the company never manifested any definite purpose of extending the line up the Arkansas. On the contrary, the President of the road in his annual report to the stockholders speaks of Cañon City as "its proper terminus." (Folio 549) He could only be induced to extend as far as Cañon City, upon condition of the people there coming to his aid with a large subsidy. (See letter of President Palmer, dated March 18, 1873, Folios 538-544.)

The plat of the Cañon City and San Juan Company was approved on June 22, 1877. Had appellant, at that time, appropriated such a right of way over the disputed ground as would have enabled it to maintain trespass against an individual for an entry?

VII

It is thought that the foregoing touches upon all the leading features of the cases, and that nothing remains meriting any further extended argument. It was sought in the pleadings to attack the Cañon City and San Juan Company as an impotent affair, with a capital wholly insufficient to accomplish the purpose of building a line through the cañon; and instigated and controlled by the machinations of the Atchison, Topeka and Santa Fe Company, "a wealthy corporation, which having migrated

from the State of Kansas to the State of Colorado, about the year of our Lord 1876, is envious of plaintiff and covetous of its vested rights," etc., etc. (Folios 203-9, No 811.) It is also argued in one of the briefs that the incorporation of the Cañon City and San Juan Company was purely factitious, and that the Atchison, Topeka and Santa Fe Company is the real offender against appellant's supposed rights.

It is difficult to see what proper bearing all this has upon the case.

The Cañon City and San Juan Company was, it is true, purely a local company. The business men of Cañon City, despairing of a profitable railroad connection unless they themselves took the initiative, organized for the purpose set forth in their certificate. It argues no insincerity, that they fixed the capital stock at the small sum of one hundred thousand dollars. The statute provides a mode by which at any time it may be increased to that many millions. (Revised Stats. of Colorado, page 122.) The proof shows that they are proceeding with diligence in building the road, and by the decrees they are certainly given very little time in which to grade through the Royal Gorge. It is strange to ask this court to go into the inquiry where the money comes from.

The incorporators of the Cañon City and San Juan Company did not expect by their own unaided means to accomplish the enterprise. They relied upon the enlistment of other capital, and this they found with parties having a large interest in the Atchison, Topeka and Santa Fe Company, who made subscriptions to the stock. In this sense, that the principal stockholders are the same in both companies, it may be said that the latter company is "the active and controlling power." The Atchison Company answers, accordingly, admitting that W. B. Strong and A. A. Robinson are its officers, and that they are also officers of the Cañon City and San Juan Company, and that they are engaged in assisting the latter company to construct its line of railway. That their acts in the prem-

ises are performed by them as officers of the Cañon City Company. That the Atchison Company expects to derive profit and advantage by connecting with the Cañon City Company, and hence that it intends to furnish money to build the road. (Folio 290-300, No. 811.) There is nothing in this showing bad faith—nothing which the law discourages or prohibits.

It is entirely true that the fact of appellant organizing a force of graders to take possession of the Grand cañon on April 19, stimulated the Cañon City and San Juan Company to commence the active work of construction sooner than they otherwise would have done. It was not to be expected that they would stand by and permit their right of way to be occupied adversely by another company. It is of no importance whether their preparations were made in one day or one month, provided they had the legal right to take possession. The same state of facts existed in Morris and Essex R. R. Co. vs. Blair et al., 1 Stockton, 643.

On the contrary, we charge that the appellant is, and for a long time past, has been insolvent; that it has no means to construct a road through the cañon; that it does not intend to build; and that it attempted to take possession of the cañon for wrongful purposes. (Folio 263, No. 811.) This is in denial of the allegations in the bill that appellant intends in good faith to build a railroad over the ground in controversy, which intention, it is claimed, we have thwarted. We regard this as an important issue. No attempt was made upon the hearing to prove that the appellant was in a position financially to build, or that its attempted entry was made for that purpose.

VIII.

It is said that the map of the Cañon City and San Juan Co. approved by the Secretary of the Interior, is not a compliance with the act of March 3, 1875, because; first, the act contemplates an actual location of the line on the

ground; second, it contains no field notes; third, at the time of the survey, none of the lands within the cañon had been sub-divided.

We answer these objections by saying that the line *was* actually surveyed, located and staked in the field. There was no more chamber work about it than is necessary in all cases of railroad surveys. Mr. Holbrook, who was the Chief Engineer in charge, testifies that he run a transit line through the entire cañon, kept the courses, fitted in the curves, measured the distances with a chain, and put in stakes, from fifty to one hundred feet apart, generally fifty, (Folio 293 of testimony.) In this he is corroborated by his assistants. It is true that through the Royal Gorge, it was impossible to *stake* the line, for the reason that the rock sides are almost perpendicular. Through this part of the cañon, he run a base line upon the ice, and deduced his location by triangulating therefrom; and we presume it is by reason of this fact, that counsel claims that no right accrued. The one mode of survey, however, is as accurate as the other; an actual location can be drawn from either. If the Royal Gorge is the steep and rugged spot represented by the bill, it is difficult to see how any other method of survey could have been adopted by engineers, having in view the safety of their own lives.

Second—The map approved by the Secretary of the Interior *did* have noted upon it, the field notes of survey. A tracing of this map was offered in evidence, and identified by Mr. Holbrook as correct, so far as it showed the alignment, *without the field notes.* He testified, however, that the map filed, exhibited the notes of the alignment, points of beginning and end of curves, the degree of the curve, and the number of degrees turned. (Folio 297 tetimony.) The witness then produced the original, showing the field notes, and the same was offered and received. Not having access to the record, we cannot tell which one of these maps, the imperfect tracing or the original, was sent up; but other parts of the record show that the map

filed and approved, and afterwards put in evidence, did contain the notes.

This, however, is purely unnecessary—for the reason that it is the *alignment* traced upon the map, and not the field notes from which it is drawn, that governs the draughtsman in noting the line upon the township plats, after approval. As a matter of Departmental practice, the tracing that is returned to the local land office, after the approval of the plat, never does contain the field notes. The argument that there is a liability of error in the process of transcription, is a strange argument to address to a court.

Third—That the Cañon City and San Juan Co. acquired no rights by reason of the approval of the plat, because at the time the townships through which the line runs had not been sub divided, is a claim equally untenable. The law permits a railroad company, duly organized, to enter upon *all* public lands, surveyed and unsurveyed, provided within a certain time after location it files its plat.

True, it forfeits no right by reason of its location over unsurveyed lands, provided it makes its filing within twelve months after the survey thereof; but if any township intersected by the line is unsurveyed at the time of location, the Company may for itself extend the sub-division lines, so as to show the conformity to the public surveys, and at once file the plat.

This practice has always been recognized by the land department, in such cases, and regulations have been adopted concerning it, which are set forth in its "Circular of instructions, under the act of Congress, approved March 3, 1875," dated March 9, 1878.

In conclusion, we submit that if the D. & R. G. Co. has any intention of building through the Grand cañon, they have every opportunity given them under the decrees to do so; no obstacle is opposed; they could have proceeded at once to construct, within or without the right of way of the Cañon City Co., crossing it if necessary, and with liberty of exhibiting a bill to compel the appellee to change

its location so as to permit a more convenient location of its own roadway; if at any points in the cañon, the construction and operation of two roads were thought to be impracticable, it could have had permission to occupy our track. It seems to be admitted that the part of the cañon, known as the Royal Gorge, is the only portion where two roads cannot be safely operated on the same side of the river. As to this particular point, the appellant may proceed at once to grade on the south side of the river, or it may have joint trackage over our grade on the opposite side; and good faith on the part of the appellee is compelled, by providing that its road shall be completed through the Gorge within six months.

There is a spirit of fairness about the decrees that must commend itself to this court—evidencing the purpose of the Circuit Court, to so adjust this controversy, as to throw no impediment in the way of either enterprise.

Unless the object of the D. & R. G. is merely to harrass a rival company, it can find in the decrees ample opportunity to accomplish its lawful purposes.

CHAS. E. GAST,
Solicitor for Appellees.